Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

AT&T INC. (F/K/A SBC COMMUNICATIONS INC.),
Petitioner,

v.

RLH INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

PETITION FOR A WRIT OF CERTIORARI

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May 23, 2006

QUESTION PRESENTED

Whether a State's direct regulation of commercial conduct that occurs wholly outside that State and that has no effect on consumers or markets within that State is a *per se* violation of the Commerce Clause.

PARTIES TO THE PROCEEDINGS

Petitioner AT&T Inc. (f/k/a SBC Communications Inc.) ("AT&T") was a defendant/respondent in the proceedings in the California state courts. Respondent RLH Industries, Inc. ("RLH") was the plaintiff/appellant in the proceedings in the California state courts.

Pacific Bell Telephone Company ("Pacific Bell"), a wholly owned subsidiary of AT&T, also was a defendant/respondent in the proceedings in the California state courts. The California Superior Court granted summary judgment to Pacific Bell, the Court of Appeal affirmed that decision, and RLH did not petition for review of that holding in the California Supreme Court. Accordingly, Pacific Bell no longer has any continuing interest in this case and will not participate as either a petitioner or a respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner AT&T Inc. (f/k/a SBC Communications Inc.) states the following:

On November 18, 2005, SBC Communications Inc. merged with AT&T Corp. That same day, SBC Communications Inc. changed its name to AT&T Inc. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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Petitioner AT&T Inc. (f/k/a SBC Communications Inc.) respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California in this case.

INTRODUCTION

This case presents a frequently litigated issue of constitutional law that divides the federal courts of appeals and is of great significance to businesses across the nation: Does the Commerce Clause permit a State directly to regulate commerce occurring wholly outside that State's borders?

The California Court of Appeal sided with the First and Eighth Circuits in permitting such extraterritorial regulation, subject to an amorphous balancing of local benefits and potential burdens on interstate commerce. By contrast, the Second, Seventh, Ninth, and Tenth Circuits have held that such extraterritorial regulation constitutes a *per se* violation of the Commerce Clause.

This case presents the question in a stark and straightforward fashion. The plaintiff, RLH Industries, Inc. ("RLH"), does not dispute that the actions for which it seeks relief from AT&T Inc. ("AT&T") occurred exclusively outside of California. Moreover, RLH has alleged no effect of those actions on California consumers or markets; the only effect to which RLH points is the injury to itself, a California resident, sustained *outside* of California, in the course of efforts to compete *outside* of California. Yet the California Court of Appeal found no *per se* bar to applying California's antitrust and unfair competition laws to markets throughout the country in which RLH has sought to compete, even when the alleged anticompetitive activity has no impact on California markets or consumers. In other words, California claims that, at the behest of any business with operations in California, it can trump the laws of other States in order to regulate transactions that take place and have market effects only in those other States.

The adverse consequences for interstate commerce from the California court's decision are potentially enormous. California is the nation's most populous State. Under the decision below, California may apply its laws to extraterritorial conduct that in any way affects a California business choosing to do business outside the State, even where, as here, the conduct at issue has no effect on consumers or markets in California. Businesses sued by California plaintiffs are now potentially subject to inconsistent demands from, on the one hand, California and, on the other hand, different States properly attempting to regulate conduct *within* their borders. Moreover, because two federal courts of appeals share the approach of the California court, businesses also risk being sued for wholly extraterritorial activity by residents of States in the First and Eighth Circuits under the laws of those plaintiffs' home States.

In place of the *per se* rule that should bar such extraterritorial application of California law under this Court's precedents, the California Court of Appeal required the defendant to prove that the burden of extraterritorial regulation "'is clearly excessive in relation to the putative local benefits.'" Pet. App. 15a (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Forcing businesses to rely for their defense on such fact-intensive balancing, weighted in favor of constitutionality, creates an unacceptable level of uncertainty regarding whether they must conform their conduct to California law in addition to the laws of the jurisdictions in which they operate. The *Pike* test was designed for state laws that target in-state activity and only incidentally affect interstate commerce. It was not intended to justify wholly extraterritorial application of a State's laws. The rule that States may not govern extraterritorially is a basic principle of federalism whose applicability does not turn on a balancing test. This Court has not hesitated to review decisions from intermediate California appellate courts that involve important constitutional issues, and it should grant review here.

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. 2a-21a) is reported at 133 Cal. App. 4th 1277, 35 Cal. Rptr. 3d 469. The order of the California Superior Court (Pet. App. 22a-24a) is unreported.

JURISDICTION

The judgment of the California Court of Appeal was entered on November 3, 2005. The California Supreme Court denied a petition for review on February 22, 2006. *See* Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art. I, § 8, Cl. 3, provides in relevant part:

> The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States[.]

Relevant statutes are set forth at Pet. App. 43a-59a.

STATEMENT OF THE CASE

RLH is a California corporation that manufactures high voltage protection ("HVP") equipment. *See* Pet. App. 26a (Second Am. Compl. ¶ 4). HVP equipment protects telephone lines against hazardous voltages generated by lightning or voltage surges. RLH attempted to sell its equipment to customers of various local telephone companies (subsidiaries of AT&T) in Nevada, Texas, Oklahoma, Missouri, Kansas, Arkansas, Indiana, Ohio, Wisconsin, Illinois, Michigan, and Connecticut. *See id.* at 31a-32a (¶¶ 21-22, 24). RLH alleges that it was excluded from the HVP equipment market in each of these States by a purported arrangement that "tied" HVP service to telephone service, requiring customers to purchase their HVP equipment from the local telephone company or a source "approved" by that company. *See id.* at 33a, 35a (¶¶ 28, 37).

RLH filed suit against petitioner AT&T[1] in California superior court under California's Cartwright Act and Unfair Competition Act (reproduced at Pet. App. 43a-59a). RLH's Second Amended Complaint – now the operative pleading – sought, *inter alia*, a judgment that the alleged anticompetitive conduct of the local telephone companies wholly outside California violated the Cartwright Act; treble damages for alleged violations of California law based on conduct outside of California; restitution and/or disgorgement of allegedly unlawful profits obtained from conduct outside California; an order requiring the local telephone companies operating in States other than California to cease their allegedly anticompetitive conduct outside of California; and an order requiring these local telephone companies to approve RLH's equipment for use in their States other than California. *See id.* at 38a, 40a-41a (¶ 49, Prayer for Relief). The Second Amended Complaint did not allege any claims against AT&T's out-of-state subsidiaries based on RLH's efforts to sell its product in California.[2] Nor did the complaint allege that the supposed tying arrangements implemented outside of California impacted the California market for HVP equipment or California consumers of HVP equipment. Rather, the complaint alleged that the conduct of AT&T's

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[1] AT&T is a holding company that is incorporated in Delaware and has its principal place of business in Texas. AT&T provides no telecommunications services; rather, its subsidiaries provide such services to consumers. AT&T is not registered to do business in California and has no contacts with the State of California. The California superior court nonetheless ruled that it had personal jurisdiction over AT&T. That erroneous ruling is not at issue in this petition.

[2] The Second Amended Complaint did allege such claims, based on alleged anticompetitive activity in California, against Pacific Bell, an AT&T subsidiary and the local telephone company in California. The trial court granted summary judgment to Pacific Bell. The California Court of Appeal affirmed, finding that RLH failed to raise a triable issue as to whether Pacific Bell illegally tied its HVP service to its local telephone service. *See* Pet. App. 2a-3a. That holding is not at issue in this petition.

out-of-state subsidiaries injured RLH as a potential competitor, and that RLH was a California resident. *See also supra* note 2 (explaining that RLH's claims against the AT&T subsidiary that serves California were dismissed and are no longer at issue in this case).

AT&T moved to strike the portions of the Second Amended Complaint seeking damages from and an injunction against AT&T and its non-California subsidiaries.[3] AT&T argued that "plaintiff's prayer for injunctive relief and damages is based on conduct occurring in states other than California" and "would give improper extraterritorial effect to California law." Defendant's Notice of Motion and Motion To Strike at 3 (filed July 23, 2003). RLH opposed the motion on the ground that it was immaterial where in the United States the alleged anticompetitive conduct occurred, because "[AT&T] engaged in intentional conduct designed to injure RLH, a California resident." Plaintiff's Opp. to Motion To Strike at 2-3 (filed Aug. 14, 2003).

The Superior Court denied the motion to strike, reasoning that, because it had personal jurisdiction over AT&T, "it can order [AT&T] to act or refrain from action outside of California." Aug. 26, 2003 Minute Order. AT&T sought a writ of mandate, which the California Court of Appeal denied, and the California Supreme Court denied review.

AT&T then sought summary judgment on, *inter alia*, the ground that the Commerce Clause bars RLH's claims. AT&T argued that, under *Healy v. The Beer Institute*, 491 U.S. 324 (1989), a State cannot regulate commerce that takes place wholly outside its borders. AT&T further observed that every State where an AT&T subsidiary provides local telephone service has its own regulatory body

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[3] Under California law, a motion to strike may be brought to "[s]trike out any irrelevant . . . matter inserted in any pleading," Cal. Code Civ. Proc. § 436(a), and a request for relief is "immaterial" if it is "not supported by the allegations of the complaint," *id.* § 431.10(b)(3).

and tariffs. For example, the regulatory tariffs in the States where Ameritech, one of AT&T's subsidiaries, operates specify that only the local telephone company may install HVP equipment. *See* Defendants' Separate Statement of Undisputed Facts at 6 (Fact No. 22) (filed Apr. 9, 2004); Request for Judicial Notice, Exhs. 7-14 (filed Apr. 9, 2004) (tariffs filed with the Federal Communications Commission, Illinois Commerce Commission, Indiana Utility Regulatory Commission, Michigan Public Service Commission, Public Utilities Commission of Ohio, and Public Service Commission of Wisconsin).

The Superior Court granted summary judgment to AT&T on different grounds, finding that RLH failed to establish the elements of an illegal tying arrangement. *See* Pet. App. 22a-24a. On appeal, AT&T noted that the Court of Appeal was obligated to uphold the trial court's decision if that decision was correct on any legal theory raised below, and renewed its contention that the Commerce Clause bars application of California law to commerce occurring wholly outside of California. AT&T again cited *Healy* for the proposition that "the 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders.'" Brief for Respondents at 31 (quoting 491 U.S. at 336) (ellipsis in original). In response, RLH argued that the Cartwright and Unfair Competition Acts properly regulate conduct occurring anywhere in the United States that significantly affects a California resident, and that RLH properly invoked California law against AT&T because the extraterritorial activities of AT&T's subsidiaries impacted RLH, a California corporation. *See* Appellant's Reply Br. at 17-24; *see also id.* at 7 ("Pacific Bell was named as a defendant to face responsibility for the conduct which injured RLH in California. SBC was named as a defendant to face responsibility for *conduct in other states* which resulted in injury to RLH.") (emphasis added).

The Court of Appeal reversed the grant of summary judgment to AT&T. With respect to AT&T's Commerce Clause argument, the court concluded that "the commerce clause does *not* bar application of California antitrust law to out-of-state anticompetitive conduct that causes injury in California." Pet. App. 3a. The court acknowledged *Healy*'s statement that the Commerce Clause "precludes the application of a state statute" to wholly out-of-state commerce "whether or not the commerce has effects within the State." *Id.* at 12a. But the court believed that it could not "blindly wield" that principle "without taking a closer look at the issue actually decided in *Healy*." *Id.* at 13a. The court proceeded to find the rule of *Healy* inapplicable to the facts of this case, reasoning that *Healy* involved a statute regulating prices; that "*Healy* was *not* specifically concerned with the extraterritorial application of state antitrust laws"; and that *Healy* relied on a non-antitrust case, *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). Pet. App. 13a.

The Court of Appeal thus confined *Healy* to its precise facts, concluding that the language cited by AT&T "restates the 'specific concerns' that *price-affirmation statutes* have raised under the commerce clause." *Id.* at 14a. Having thus dismissed this Court's decision in *Healy*, the court squarely rejected AT&T's argument that a State's regulation of wholly extraterritorial conduct was a *per se* violation of the Commerce Clause. According to the court, "the commerce clause's primary concern is not geographic, but practical," and the clause "focuses on the balance between the state law's benefits to local commerce and its burdens upon interstate commerce, not simply on the location of the challenged conduct." *Id.* at 15a. The court held that, even when a state statute directly regulates interstate commerce, its constitutionality turns on a "fact-intensive balancing analysis": the "basic consideration of commerce clause jurisprudence" was, "[t]aking everything into account, does the state law unreasonably burden interstate commerce?" *Id.* After declining to conduct such a

balancing analysis – stating that "[AT&T] has not attempted to carefully balance the benefits of applying California law to their alleged out-of-state tying arrangements against the burden that condemning the tying arrangements under California law . . . would impose on interstate commerce," and "[w]e decline to do so for it" – the Court of Appeal remanded the case to the superior court. *Id.* at 15a-16a.

AT&T sought review of the Commerce Clause issue in the California Supreme Court, presenting the question: "Does the Commerce Clause of the United States Constitution bar California from applying its antitrust laws to allegedly anti-competitive conduct that takes place entirely out of state and has no effect upon California markets or California consumers?" Petition for Review at 5 (filed Dec. 13, 2005). On February 22, 2006, the California Supreme Court denied review. *See* Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for three reasons. First, under a proper reading of this Court's precedents, a State is and should be flatly forbidden from attempting to govern commerce occurring wholly outside that State. Second, the lower courts are nevertheless confused and divided on the question whether such direct regulation is a *per se* violation of the Commerce Clause, or whether its constitutionality depends on the outcome of a balancing analysis. Third, the question presented is of enormous practical importance. If the California Court of Appeal's decision is allowed to stand, California will be able to project its legislation into other States merely because activities conducted exclusively within those other States and having effects only on markets and consumers in those other States may affect or injure one California resident seeking to do business in those States. Under the decision below, California's antitrust and unfair competition laws would control markets throughout the country so long as a California corporation is a potential plaintiff. The decision correspondingly invites other States to apply their

own laws extraterritorially whenever one of their residents believes that it has been injured by out-of-state conduct. Such interstate economic battles and the conflicting demands imposed on businesses is precisely what the Commerce Clause was designed to avoid.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

Since the Nineteenth Century, this Court has recognized that the Commerce Clause both empowers the federal government to regulate interstate commerce and restricts the authority of the States to do the same. *See, e.g., Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852). The California Court of Appeal's decision runs afoul of the correct reading of controlling Supreme Court law under which a State's direct regulation of commerce occurring wholly outside that State is unconstitutional *per se*.

A. The Decision Below Conflicts With This Court's Two-Tiered Approach To The Dormant Commerce Clause

The Court has established a two-tiered approach to determining when a state law violates what has been referred to as the "dormant" or "negative" Commerce Clause:

> When a state statute *directly regulates* or discriminates against *interstate commerce*, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) (emphases added, citations omitted); *see Healy*, 491 U.S. at 337 n.14 ("As a

general matter, the Court has adopted a two-tiered approach to analyzing state economic regulation under the Commerce Clause.").

Brown-Forman also explains that "there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach," and that "[i]n either situation the critical consideration is the overall effect of the statute on both local and interstate activity." 476 U.S. at 579. The Court thus recognized that whether a statute falls into the first or second *Brown-Forman* category often turns on the statute's practical impact. As the Court later explained in *Healy*, "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." 491 U.S. at 336.

Healy summarized the Court's "cases concerning the extraterritorial effects of state economic regulation" as "stand[ing] at a minimum" for several propositions. *Id.* One is that "the 'Commerce Clause . . . *precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.*'" *Id.* (quoting *Edgar*, 457 U.S. at 642-43 (plurality)) (emphasis added). Another is that "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* The Court explained that, "[g]enerally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Id.* at 336-37.

The Court additionally reaffirmed its statement in *Brown-Forman* that "the critical consideration in determining whether the extraterritorial reach of a statute violates the Commerce Clause is the overall effect of the statute on both local and interstate commerce." *Id.* at 337

n.14. While the California court cited this language as evidence that the constitutionality of extraterritorial regulation depends on a balancing test, *see* Pet. App. 14a, the footnote simply confirms that whether a statute regulates extraterritorially involves consideration of practical consequences, not just the face of the statute. In this case, there is no dispute over whether RLH's lawsuit directly regulates extraterritorial conduct: RLH concededly seeks to enjoin and deter conduct occurring wholly outside of California. *See supra* pp. 4-5 (discussing and citing RLH's Second Amended Complaint).

Under *Healy* and *Brown-Forman*, RLH's effort to apply California law directly to activity outside of California is unconstitutional *per se*, regardless of whether the extraterritorial activity also has effects upon a competitor resident in California. *Healy* invalidated a Connecticut statute that effectively governed beer prices in other States. *See* 491 U.S. at 337-39. Similarly, *Brown-Forman* invalidated a statute that, in practice, required distillers to obtain approval from New York before changing prices in other States. *See* 476 U.S. at 583. In neither case did the Court employ the balancing analysis of *Pike*. Rather, after determining that the law at issue "directly regulated commerce" in other States, the Court struck it down "without further inquiry." *Brown-Forman*, 476 U.S. at 579, 584; *see Healy*, 491 U.S. at 339. The *Pike* test, which weighs the local benefits of the statute against the burden on interstate commerce, governs when "a statute has only indirect effects on interstate commerce." *Brown-Forman*, 476 U.S. at 579. Here, California's regulation of the conduct of AT&T's subsidiaries outside of California is not an "indirect" consequence of the regulation of in-state activity. On the contrary, RLH's lawsuit against AT&T does not arise from any in-state activity at all: it targets out-of-state conduct purely and directly, seeking damages for, and an injunction against, allegedly anticompetitive acts that are exclusively extraterritorial.

The California Court of Appeal dismissed the holdings of *Healy* and *Brown-Forman* with the statement that "the commerce clause's primary concern is not geographic, but practical." Pet. App. 15a. The court cited *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978), and *Pike* in support of its view that Commerce Clause jurisprudence "focuses on the balance between the state law's benefits to local commerce and its burdens upon interstate commerce, not simply on the location of the challenged conduct." Pet. App. 15a.

The California court's assertions are quite wrong; they ignore the first "tier" of the Court's approach to the dormant Commerce Clause. Nothing in *Raymond Motor* or *Pike* casts doubt on the proposition that a law directly controlling extraterritorial commerce is unconstitutional *per se* "without further inquiry." *Brown-Forman*, 476 U.S. at 579. Both of those cases involved statutes falling into the second *Brown-Forman* category of laws targeting in-state activity that had "only indirect effects on interstate commerce." In *Raymond Motor*, the Court considered the constitutionality of Wisconsin regulations "governing the length and configuration of trucks that may be operated within the State." 434 U.S. at 430. In *Pike*, the Court considered an Arizona statute requiring that fruit grown within the State be packed and labeled in a certain manner. In both cases, because the effects on interstate commerce were "only incidental," *Pike*, 397 U.S. at 142, the Court employed a balancing test to determine that the state laws at issue unconstitutionally burdened interstate commerce. Because the extraterritorial regulation at issue here is in no way "incidental," the lower court erred in holding that the constitutionality of applying California law to the alleged conduct of AT&T's subsidiaries turned on the outcome of a balancing test.

While direct regulation of extraterritorial conduct is impermissible even when that conduct has in-state effects, *see Healy*, 491 U.S. at 336, the lower court also erred in concluding that any injury to RLH amounted to a

substantial effect on commerce within California. It is undisputed that the only effect "within" California alleged by RLH is the injury purportedly suffered by RLH itself in its efforts to do business outside the State. This Court has recognized in a related context that financial injury to a U.S. corporation from anticompetitive conduct abroad is not an effect on U.S. commerce warranting application of U.S. antitrust law. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 & n.6 (1986) (explaining that "[t]he Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce," and that U.S. manufacturers "cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies"). Similarly, injury to a resident of California from anticompetitive conduct elsewhere that has no impact on California markets or consumers does not warrant application of California antitrust law. *See also Power East Ltd. v. Transamerica Delaval, Inc.*, 558 F. Supp. 47, 49 (S.D.N.Y.) (where activities complained of occurred outside the U.S., and the market from which plaintiff was supposedly excluded was outside the U.S., the fact that both the defendant and the plaintiff's principal shareholder were U.S. citizens did not "provide[] the requisite nexus with American trade that would bring the alleged illegal activity within the purview of the Sherman Act"), *aff'd*, 742 F.2d 1439 (2d Cir. 1983) (table); *Emergency One, Inc. v. Waterous Co.*, 23 F. Supp. 2d 959, 971 (E.D. Wis. 1998) (holding that the plaintiff could not bring a claim under Wisconsin antitrust law because mere injury to the plaintiff, which allegedly operated three Wisconsin dealerships, did not constitute significant injury to trade and commerce in Wisconsin).

Finally, the lower court was also wrong to claim that the Commerce Clause is not concerned with "geograph[y]." Pet. App. 15a. On the contrary, the Court's Commerce Clause jurisprudence is grounded on fundamental princi-

ples of federalism that recognize the geographic limitations of each State's jurisdiction and sovereignty. As *Healy* explained, that jurisprudence "reflect[s] the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." 491 U.S. at 335-36 (footnote omitted).[4]

B. This Court's Two-Tiered Approach To The Dormant Commerce Clause Is Not Restricted To The Context Of Price Regulation

The lower court additionally misread this Court's decisions in attempting to confine *Healy* to its facts, suggesting that *Healy* merely "restates the 'specific concerns' that *price-affirmation statutes* have raised under the commerce clause." Pet. App. 14a. *Healy* struck down a law

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[4] The Court has recognized the prohibition on extraterritorial regulation not only under the Commerce Clause, but also under other constitutional provisions, such as the Due Process Clause and the Full Faith and Credit Clause. *See, e.g., New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state and into the state of New York . . . . The principle . . . lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause."); *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 572-73 (1996) (concluding from "principles of state sovereignty and comity" that "a State may not impose economic sanctions on violators of its law with the intent of changing the tortfeasors' lawful conduct in other States") (citing *Healy*, 491 U.S. at 335-36, and *Edgar*, 457 U.S. at 643 (plurality)); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred. . . . A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders[.]") (citing *Gore*, 517 U.S. at 569, 572; *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975); *Head*, 234 U.S. at 161; and *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states."). *See also Bonaparte v. Appeal Tax Court*, 104 U.S. 592, 594 (1881) ("No state can legislate except with reference to its own jurisdiction.").

requiring out-of-state beer shippers to affirm that their posted prices for sales within Connecticut were, at the time of posting, no greater than their prices for sales outside the State. The Court, however, made clear that its holding flowed from fundamental Commerce Clause principles, not from any principles unique to the context of price-affirmation statutes. It applied the general rule of *Brown-Forman* – that the Commerce Clause bars a State's regulation of "commerce that takes place wholly outside of the State's borders" (*Healy*, 491 U.S. at 336) – to the specific context of price affirmation, striking down the Connecticut statute because it "has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." *Id.* at 337. According to the Court, the statute had the practical impact of governing prices in Massachusetts (because of its interaction with the Massachusetts beer-pricing statute); deterring promotional discounts in New York; and deterring volume discounts in Massachusetts, New York, and Rhode Island. *See id.* at 337-39. Similarly, in this case, RLH seeks to use California law to make AT&T's subsidiaries change their filed tariffs in Illinois, Indiana, Michigan, Ohio, and Wisconsin. *Cf.* Appellant's Reply Br. at 24-25 (conceding that tariffs in other States specify that local telephone companies will provide HVP service, but arguing that a California court may compel AT&T's subsidiaries to rewrite their tariffs in those States).

Healy's reliance on *Edgar v. MITE Corp.* further confirms that its reasoning is not restricted to the context of price regulation. In *Edgar*, the Court invalidated an Illinois takeover statute that governed interstate tender offers where the target company had certain Illinois connections (e.g., it had its principal executive office in Illinois, or was at least 10% owned by Illinois shareholders). *See* 457 U.S. at 626-67. The plurality stated that the Commerce Clause prohibits "direct regulation" of interstate commerce by a State. *Id.* at 640; *see also id.* at 643 ("[A]ny attempt 'directly' to assert extraterritorial

jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's powers.") (internal quotation marks omitted). According to the plurality, the Illinois statute was unconstitutional because it "directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois." *Id.* at 641. This Court has not confined the *per se* prohibition on direct extraterritorial regulation to the specific context of price regulation, and the California court erred in refusing to recognize that prohibition.

II. THE LOWER COURTS ARE DIVIDED ON WHETHER DIRECT REGULATION OF OUT-OF-STATE COMMERCE IS A *PER SE* VIOLATION OF THE COMMERCE CLAUSE

This Court should grant certiorari because the lower courts are divided on the question whether direct regulation of extraterritorial commerce is unconstitutional "without further inquiry." *Brown-Forman*, 476 U.S. at 579. The Second, Seventh, Ninth, and Tenth Circuits have correctly interpreted this Court's precedents to invalidate statutes that directly control out-of-state commerce, regardless of whether those statutes involve setting prices. The First and Eighth Circuits, however, have followed the approach of the California court in holding that statutes directly regulating interstate commerce are properly analyzed under the *Pike* balancing test. This Court's intervention is necessary to clarify the core principles of its dormant Commerce Clause jurisprudence.

A. The Decision Below Conflicts With Decisions Of The Second, Seventh, Ninth, And Tenth Circuits

Four federal courts of appeals have, in square conflict with the decision below, recognized this Court's *per se* rule against direct extraterritorial regulation.

In *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003), the Second Circuit considered a Vermont law prohibiting distribution of sexually explicit

material to minors over the Internet. The court concluded that, "[a]lthough [the statute] does not discriminate against interstate commerce on its face, . . . it presents a *per se* violation of the dormant Commerce Clause." *Id.* at 104. The Court reasoned that, "[i]n practical effect, Vermont 'has projected its legislation[] into other States, and *directly regulated* commerce therein,'" *id.* (quoting *Brown-Forman*, 476 U.S. at 584) (emphasis added by Second Circuit); that the rule of *Healy* and *Brown-Forman* was not restricted to statutes dealing with prices, *see id.* at 103-04; and that it had "no need to apply the *Pike* balancing test," *id.* at 104.

Similarly, in *National Solid Wastes Management Association v. Meyer*, 63 F.3d 652, 653-55 (7th Cir. 1995), the Seventh Circuit invalidated a Wisconsin statute that prevented both in-state and out-of-state generators of solid waste from using Wisconsin landfills unless their home communities had a recycling program that met Wisconsin's standards. The court found the Wisconsin law unconstitutional *per se* because the law "essentially controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and therefore directly regulates interstate commerce." *Id.* at 658. The Seventh Circuit specifically noted that the principles articulated in *Healy* and *Brown-Forman* were not limited to the context of price-affirmation statutes. *Id.* at 658-59.

In *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993), the Ninth Circuit considered the constitutionality of a Nevada statute requiring national collegiate athletic associations to provide Nevada institutions, employees, and athletes accused of rules infractions with various procedural protections. *See id.* at 637. The Ninth Circuit observed that, applying the Supreme Court's "two-tiered approach to analyzing state economic regulations under the Commerce Clause,"

> we must first ask whether the Statute: 1) directly regulates interstate commerce; 2) discriminates against interstate commerce; or 3) favors in-state

> economic interests over out-of-state interests. If the Statute does any of these things, it violates the Commerce Clause per se, and we must strike it down without further inquiry.

Id. at 638. The Ninth Circuit found the statute invalid *per se* because it regulates "only interstate organizations which are engaged in interstate commerce, and it does so directly." *Id.*

Finally, the Tenth Circuit, in *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), affirmed an injunction against enforcement of a New Mexico statute that criminalized the dissemination by computer of material harmful to minors. The court concluded that the statute "represents an attempt to regulate interstate conduct occurring outside New Mexico's borders, and is accordingly a per se violation of the Commerce Clause." *Id.* at 1161.

B. The Split Of Authority Is Well Developed

Though the weight of authority is to the contrary, two federal courts of appeals have, like the court below, rejected the view that direct regulation of interstate commerce is *per se* invalid under the Commerce Clause. The circuit split on the question presented is thus wide as well as deep.

In *Grant's Dairy-Maine, LLC v. Commissioner of Maine Department of Agriculture*, 232 F.3d 8 (1st Cir. 2000), the First Circuit upheld a Maine statute setting prices for milk sold within Maine. A milk dealer had argued that Maine's minimum pricing scheme violated the dormant Commerce Clause because it directly regulated interstate commerce, citing the Court's statement in *Brown-Forman* that "'[w]hen a state statute directly regulates or discriminates against interstate commerce . . . we have generally struck down the statute without further inquiry.'" *Id.* at 19 (quoting *Brown-Forman*, 476 U.S. at 579) (alterations in original). The First Circuit rejected that argument, asserting that "this reference to direct regulation as a basis for invalidation has not been repeated in

subsequent Supreme Court opinions and it does not fit into the *West Lynn* framework. *See West Lynn* [*Creamery, Inc. v. Healy*], 512 U.S. [186,] 201 [(1994)] (directing inquiring courts to look for discriminatory 'purposes and effects')." *Id.* (citations omitted). The court concluded: "Given that the *Brown-Forman* Court itself conceded that 'the critical consideration [in a dormant Commerce Clause analysis] is the overall effect of the statute on both local and interstate activity,' we rebuff Grant's attempt to forge a new mode of analysis." *Id.* (citation omitted, alteration in original).

Similarly, in *Southern Union Co. v. Missouri Public Service Commission*, 289 F.3d 503 (8th Cir. 2002), a public utility company contended that a Missouri statute regulating interstate stock transactions occurring entirely outside Missouri was "per se invalid because it [was] both 'extraterritorial' and 'direct' regulation of interstate commerce." *Id.* at 507. The Eighth Circuit dismissed that contention, reasoning that the utility "cites no authority supporting this contention in the context of public utility regulation," *id.*, and that, "[i]n its recent Commerce Clause decisions, the Supreme Court has limited its per se rule of invalidity to provisions that patently discriminate against interstate trade," *id.* at 508 (internal quotation marks omitted). Like the First Circuit, and in square conflict with the Second, Seventh, Ninth, and Tenth Circuits, the Eighth Circuit held that Commerce Clause jurisprudence contains no *per se* prohibition on direct state regulation of interstate commerce.

There is no indication that this split among the circuits will resolve with further percolation. At least six federal courts of appeals have already weighed in on the question whether direct regulation of extraterritorial commerce is unconstitutional *per se*, with confusion rather than clarity as the result. In addition, the Third Circuit has indicated its agreement with the Second, Seventh, Ninth, and Tenth Circuits. *See A.S. Goldmen & Co. v. New Jersey Bureau of Sec.*, 163 F.3d 780, 785 (3d Cir. 1999) ("[A] state

may not attempt to regulate commerce that takes place 'wholly outside' of its borders: such 'projection of one state regulatory regime into the jurisdiction of another State' is impermissible.") (quoting *Healy*, 491 U.S. at 336-37). On the other side of the split, the Supreme Court of Washington has indicated that it follows the approach of the First and Eighth Circuits. *See State v. Heckel*, 24 P.3d 404, 409 (Wash. 2001) (finding the *Pike* balancing test to govern when a statute "is facially neutral, applying impartially to in-state and out-of-state businesses"). The conflicting decisions are recent, and commentators have remarked on the unsettled state of the law. *See* Jack Goldsmith & Alan Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 789 (2001) (while "[t]he dormant Commerce Clause . . . is . . . said to prohibit certain state laws that regulate extraterritorially and others that lead to inconsistent regulatory burdens," "[t]hese aspects of the dormant Commerce Clause are unsettled and poorly understood"); Peter C. Felmly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 Me. L. Rev. 467, 491-92 (2003) (explaining that lower courts have had difficulty determining where the prohibition on extraterritorial regulation fits into the Court's dormant Commerce Clause jurisprudence). The Court should take this opportunity to bring coherence to Commerce Clause jurisprudence in the lower courts and to clarify the scope and import of its prior decisions.

This case, moreover, poses the question of the constitutionality of extraterritorial regulation in a uniquely sharp fashion. It is undisputed that RLH seeks to apply California law to conduct that is wholly extraterritorial and that has no effect on California markets or consumers, and whose only connection to California is the bare fact of RLH's California residency. Unlike many of the cases from this Court and the federal courts of appeals applying the prohibition on direct extraterritorial regulation, this case involves no preliminary question as to whether,

while a challenged law appears to govern in-state conduct, its practical impact is to control conduct entirely outside the State. In this instance, it is clear on the face of RLH's suit that RLH seeks to invoke California law against, and to enjoin, activity that occurs exclusively outside of California and that has no impact on markets or consumers in California. AT&T has consistently pressed and preserved the question whether such direct extraterritorial regulation is unconstitutional *per se*. The California court squarely ruled on the issue, explaining its reasoning and its position at some length, and AT&T squarely presented the issue for consideration by the California Supreme Court.[5]

III. THE QUESTION PRESENTED IS OF ENORMOUS PRACTICAL SIGNIFICANCE

The issue in this case is of great significance both to businesses throughout the country and to the States whose policy choices may be undermined by the extraterritorial regulation of other States. If the decision below is allowed to stand, California's antitrust and unfair competition laws can control conduct in markets throughout the United States, even when that conduct has no effect on California markets or consumers. Companies that conduct no business in California or with California consumers will nonetheless have to conform their actions to California law, given the possibility that a California corporation may believe itself injured in the course of its efforts to compete with out-of-state companies, and may invoke California law against out-of-state conduct. Moreover, if other state courts follow the lead of the California Court of Appeal, companies resident in those States will similarly be able to apply their home-state law to markets

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[5] This Court has not hesitated to review decisions of California intermediate appellate courts when the California Supreme Court has denied review and the case involves an important constitutional question. *See, e.g., Tory v. Cochran*, 544 U.S. 734 (2005); *Stogner v. California*, 539 U.S. 607 (2003); *Hunt-Wesson, Inc. v. Franchise Tax Bd.*, 528 U.S. 458 (2000).

across the country. The First and Eighth Circuits already allow States to project their laws into other jurisdictions so long as the burden on interstate commerce is not "clearly excessive" in relation to the local benefits. *Pike*, 397 U.S. at 142. Commentators have highlighted the difficulties inherent in *Pike* balancing, which often requires courts to weigh incommensurables and to make complex empirical judgments. *See, e.g.*, Donald H. Regan, *Siamese Essays*, 85 Mich. L. Rev. 1865, 1866-68 (1987); *see also CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in the judgment) (inquiry mandated by *Pike* "is ill suited to the judicial function and should be undertaken rarely if at all"). The decision below renders balancing the touchstone of every dormant Commerce Clause case.

The current patchwork of law on extraterritorial regulation forces businesses to operate in an environment of intolerable uncertainty. It also threatens to produce exactly the type of disharmony and interstate economic battles that the Constitution's drafters had experienced under the Articles of Confederation, and that they sought to forestall with the Commerce Clause. *See, e.g.*, *Healy*, 491 U.S. at 335-36; *see also Head*, 234 U.S. at 161 (permitting the statutes of one State to operate beyond its jurisdiction and into another State would "throw[] down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority, and upon the preservation of which the government under the Constitution depends").

The risk of inconsistent regulation is especially significant in the antitrust context, because of the potential for one State to enjoin conduct that may be authorized and even required under other States' laws and to assess treble damages for conduct another State has chosen not to regulate. *See* Pet. App. 40a (Second Am. Compl., Prayer for Relief (2) (seeking treble damages)). Moreover, the adverse effects of lower courts' confusion regarding the Commerce Clause will only become more severe as

States increasingly attempt to regulate extraterritorial commerce that takes place, for example, over the Internet. *See, e.g., American Booksellers Found.*, 342 F.3d at 102-04 (analyzing a state statute regulating Internet communications under the Commerce Clause); *ACLU*, 194 F.3d at 1160-62 (same).

There is no reason to delay consideration of the Commerce Clause issue in this case. The issue is a pure question of law that will be unaffected by any proceedings on remand. Because RLH has never identified any conduct in California from which its claims against AT&T might arise, or any effect within California of the conduct of AT&T's non-California subsidiaries other than the injury to RLH, there are no facts relevant to the Commerce Clause question that might be further developed. Nor will the harms to AT&T, other companies, and consumers from California's extraterritorial regulation dissipate if AT&T ultimately prevails under a balancing analysis. Under settled Supreme Court law, no benefits on the side of regulation can justify California in controlling conduct that occurs wholly outside the State and that does not impact California markets or consumers. The lower court's approach forces antitrust defendants to undergo protracted discovery, and to face the highly uncertain outcome of an open-ended balancing test, in suits that ought to be dismissed on the pleadings. *Cf.* 6 *Moore's Federal Practice* ¶ 26.46[1], at 26-146.24 (3d ed. 2006) ("antitrust cases have become known as 'serpentine labyrinths' in which discovery is a 'bottomless pit'"). The Court should grant review to reaffirm the core principle of federalism that States may not regulate extraterritorially, and to spare businesses throughout the country from the unconstitutional burden of subjection to an array of conflicting state mandates.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 23, 2006

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IN THE SUPREME COURT OF CALIFORNIA
En Banc

No. S139602

RLH INDUSTRIES, INC.,
Plaintiff and Appellant,

v.

SBC COMMUNICATIONS, INC., ET AL.,
Defendants and Respondents.

[Filed Feb. 22, 2006]

Petition for review DENIED.

/s/ RONALD M. GEORGE
Chief Justice

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

No. G034640

RLH INDUSTRIES, INC.,
Plaintiff and Appellant,

v.

SBC COMMUNICATIONS, INC., ET AL.,
Defendants and Respondents.

[Filed Nov. 3, 2005]

OPINION

IKOLA, J.

RLH Industries, Inc. (RLH), appeals from summary judgment granted to defendants SBC Communications Inc. (SBC), and Pacific Bell Telephone Company (PacBell). RLH alleged the defendants violated California antitrust law by requiring their local telephone service customers to obtain high voltage protection (HVP) from the defendants or, in PacBell's case, from approved HVP device makers other than RLH. RLH contended the defendants' HVP policies constituted an illegal tying arrangement impairing its ability to compete in the HVP market.

We conclude the court correctly granted summary judgment to PacBell. RLH failed to raise a triable issue as to whether PacBell illegally tied its HVP service to its local telephone service, because the undisputed evidence showed PacBell offered its customers a choice between leasing PacBell's HVP services or buying their own HVP devices from two independent suppliers. Since PacBell's

HVP policy does not threaten competition, the court correctly granted summary judgment to PacBell.

On the other hand, we conclude the court erred in granting summary judgment to SBC. A triable issue exists as to whether SBC perpetrated an illegal tying arrangement; the evidence tended to show SBC's Midwest subsidiary required its customers to lease its HVP services in order to receive local telephone service, and prohibited customers from buying their own HVP devices. We cannot say, on the existing record and as a matter of law, this policy does not constitute an illegal tying arrangement.

We reject the only two grounds SBC asserts for affirming its judgment. First, SBC contends it is not liable for its subsidiaries' HVP policies, but SBC failed to show the nonexistence of triable issues as to whether it is liable under an alter ego or agency theory. Second, SBC contends the commerce clause of the United States Constitution limits California law to regulating in-state conduct. We conclude the commerce clause does *not* bar application of California antitrust law to out-of-state anticompetitive conduct that causes injury in California. Accordingly, we affirm the summary judgment in favor of PacBell, and reverse summary judgment in favor of SBC.

FACTS

In reviewing summary judgment in favor of SBC and PacBell, we "view the evidence in a light favorable to [RLH] as the losing party [citation], liberally construing [its] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in [RLH's] favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768, 107 Cal.Rptr.2d 617, 23 P.3d 1143 (*Saelzler*).)

SBC's subsidiaries provide local telephone service. SBC subsidiary PacBell provides local telephone service in California. SBC subsidiary Ameritech Corporation (Ameritech) provides local telephone service in Illinois, Ohio, Michigan, Wisconsin, and Indiana (the Midwest

region). Other SBC subsidiaries provide local telephone service in seven other states.

RLH is a California company with its principal place of business in Orange, California. It makes HVP devices, which protect telephone lines against hazardous voltages arising from ground potential rise (GPR) caused by lightning or voltage surges. Only three other North American companies manufacture HVP devices: Positron Industries (Positron), SNC Manufacturing Co. (SNC), and Westell Technologies, Inc.

PacBell and Ameritech require their local telephone service customers at sites exceeding 1,000 GPR, like utility companies, to use HVP devices. The two companies have different HVP policies.

PacBell offers its customers a choice between leasing HVP services from PacBell, or buying and installing their own HVP devices. Customers who lease HVP protection from PacBell sign 20-year leases containing "mixed use" provisions, which require customers who later want to install their own HVP devices to pay a termination fee and replace any existing PacBell-installed HVP devices. Customers who install their own HVP devices must buy them from PacBell-approved suppliers. PacBell generally approves Positron and SNC devices for use throughout the state. PacBell generally approves RLH devices for use by Northern California customers, but only sporadically approves RLH devices in certain Southern California areas. PacBell requires all its customers at locations with GPR exceeding 20,000 to use RLH devices.

Ameritech requires its customers to lease its HVP service. Customers cannot install their own HVP devices. Ameritech installs only Positron's devices, except it uses RLH's devices at sites where GPR exceeds 20,000.

RLH sued SBC and PacBell over their HVP policies, alleging the defendants illegally used their market power in the local telephone service market to "tie" customer into leasing HVP services from them. In the operative second amended complaint, RLH asserted causes of action for

Cartwright Act violations, unfair competition, and intentional interference with prospective economic advantage. The court granted summary judgment to the defendants, holding the HVP policies did not constitute tying arrangements.

DISCUSSION

To obtain summary judgment, the defendants must show an element of each of RLH's causes of action cannot be established, or show a complete defense thereto. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 107 Cal.Rptr.2d 841, 24 P.3d 493 (*Aguilar*).) They bear the burden to "make a prima facie showing of the nonexistence of any triable issue of material fact." (*Ibid.*) If they do so, RLH must show some triable issue of material fact does exist. (*Ibid.*) On appeal, "we must independently examine the record to determine whether triable issues of material fact exist." (*Saelzler, supra*, 25 Cal.4th at p. 767, 107 Cal.Rptr.2d 617, 23 P.3d 1143.)

No Evidence Suggests PacBell Unlawfully Tied HVP Protection to Its Telephone Service

RLH alleges PacBell's HVP policy violates California's antitrust law, the Cartwright Act (Bus. & Prof. Code, § 16720, subd. (a)), by constituting a tying arrangement. "A tying arrangement is 'a requirement that a buyer purchase one product or service as a condition of the purchase of another. [Citation.] Traditionally the product which is the inducement for the arrangement is called the "tying product" and the product or service that the buyer is required to purchase is the "tied product."'" (*Morrison v. Viacom, Inc.* (1998) 66 Cal.App.4th 534, 540-541, 78 Cal.Rptr.2d 133 (*Morrison*).)

"The elements of a per se tying arrangement violative of [Business and Professions Code] section 16720 are: '(1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product or service; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; (3) a substantial amount of

sale was affected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act.'" (*Morrison*, *supra*, 66 Cal.App.4th at pp. 541-542, 78 Cal.Rptr.2d 133.)

Although the parties dispute each element, RLH's lack of evidence tending to show the first element – a tying arrangement – is dispositive. The undisputed evidence showed PacBell does not "link" its telephone service to its HVP service. Rather, its customers have a choice among competitors. They can choose to lease PacBell's HVP service, or buy and install their own HVP devices from Positron or SNC. PacBell does not "tie" its HVP service to its telephone service merely by packaging them together, because its customers can choose to buy telephone service and HVP service separately, from different parties. (See *Northern Pacific Railway Company v. United States* (1958) 356 U.S. 1, 6, fn. 4, 78 S.Ct. 514, 2 L.Ed.2d 545 (*Northern Pacific*) ["Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price"]; see also *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* (1984) 466 U.S. 2, 12, 104 S.Ct. 1551, 80 L.Ed.2d 2 ["Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively – conduct that is entirely consistent with" antitrust law].)[1]

For PacBell's HVP policy to constitute an illegal tie, RLH must show PacBell had a direct financial interest in the other HVP providers. (See *Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 543, 161 Cal.Rptr. 811 [mobile home park illegally tied home sales to home sites by requiring customers to purchase homes from suppliers who paid commissions to

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[1] When reviewing alleged tying agreements, California courts may seek guidance from federal law construing the Sherman Antitrust Act, which also prohibits tying agreements. (*Morrison*, *supra*, 66 Cal.App.4th at p. 541, 78 Cal.Rptr.2d 133.)

the park]; *Carl Sandburg Village Condo. Ass'n. v. First Condo.* (7th Cir. 1985) 758 F.2d 203, 207 (*Carl Sandburg*) ["an illegal tying arrangement will not be found where the alleged tying company has absolutely no economic interest in the sales of the tied seller, whose products are favored by the tie-in"].) But no evidence suggests PacBell has any such direct financial interest in Positron or SNC. Positron did give free training for its HVP devices to PacBell, but it is undisputed that Positron offers the same free training to all its current and potential customers, whether they buy its HVP devices or not. The free training is not a direct financial interest in Positron.

As an alternative theory, RLH asserts PacBell need not have an interest in the approved suppliers, because it unreasonably withheld approval of RLH devices. RLH relies on *Tic-X-Press, Inc. v. Omni Promotions Co. of GA.* (11th Cir. 1987) 815 F.2d 1407, 1416 (*Tic-X-Press*), which states: "Where a contract . . . provides that buyers shall use only the seller or a source 'approved' by the seller to purchase the tied product, the courts have looked to see if the approval clause was reasonable and permitted the buyer meaningful freedom of choice, or whether it is manipulated by the seller to force the buyer to purchase the tied product from the seller." RLH contends PacBell manipulated customers into leasing its HVP service by unreasonably denying them the option of using RLH's purportedly superior HVP devices.

But *Tic-X-Press* offers no help to RLH, because it does not eliminate the direct financial interest requirement. The defendant and the approved supplier in that case were "under common ownership and management and essentially function[ed] as a single entity." (*Tic-X-Press, supra*, 815 F.2d at p. 1411.) And the cases on which *Tic-X-Press* relies expressly endorse the direct financial interest requirement. (*Midwestern Waffles, Inc. v. Waffle House, Inc.* (11th Cir. 1984) 734 F.2d 705, 712 ["Only if a franchisee is coerced into purchasing products from a company in which the franchisor has a financial interest

does an illegal tie exist"]; *Kentucky Fried Chicken v. Diversified Packaging* (5th Cir. 1977) 549 F.2d 368, 378 ["When the victim of an alleged tie-in is not required to buy a single unit of the tied product from the tying party or from any source in which the tying party has an interest or on whose sales the tying party earns a commission, the arrangement simply does not constitute a tie"].)

As a final fallback, RLH contends PacBell's "mixed use" policy constitutes a tying arrangement. This policy forbids customers who lease PacBell's HVP services from later installing their own HVP devices without first replacing all PacBell-installed HVP devices and paying a hefty termination charge. RLH contends the lease terms dissuade PacBell's HVP customers from switching to RLH devices, thus impairing competition. But this policy preserves competition because PacBell's customers may avoid the purportedly onerous lease terms by choosing to buy their own HVP devices at the outset. (Cf. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.* (3d Cir. 1997) 124 F.3d 430, 440 [no tying agreement where "the Domino's franchisees could assess the potential costs and economic risks [of an approved-supplier requirement] at the time they signed the franchise agreement"].) No evidence suggests PacBell imposed the mixed use policy on customers only after they "locked in" to leasing its HVP services. (Cf. *Eastman Kodak v. Image Technical Services* (1992) 504 U.S. 451, 476-477, 112 S.Ct. 2072, 119 L.Ed.2d 265.)

In short, RLH overlooks that the antitrust law is "concern[ed] with the protection of *competition*, not *competitors*. . . ." (*Brown Shoe Co. v. United States* (1962) 370 U.S. 294, 320, 82 S.Ct. 1502, 8 L.Ed.2d 510.) PacBell's HVP policy protects competition by allowing customers to choose between leasing its HVP services or buying their own HVP devices from two suppliers in whom PacBell has no direct financial interest. PacBell's decision not to approve RLH devices as often as RLH would like may harm RLH as an individual *competitor*, but it does not harm *competition*.

PacBell's HVP Policy Is Not Unfair or Independently Wrongful

Having properly granted PacBell summary judgment on the Cartwright Act causes of action, the court also properly granted PacBell summary judgment on the unfair competition cause of action. (Bus. & Prof. Code, § 17200 (§ 17200).)

RLH contends PacBell's HVP policy may constitute an unfair business practice, even if it does not violate the Cartwright Act. RLH relies on *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527 (*Cel-Tech*), which defined "unfair" as "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Id.* at p. 187, 83 Cal.Rptr.2d 548, 973 P.2d 527.) RLH claims PacBell's HVP policy need not be a "full-blown" antitrust violation to be deemed "unfair."[2]

Even if so, nothing suggests PacBell's HVP policy "threatens an incipient violation" of the Cartwright Act, violates its policy or spirit, or otherwise threatens competition. (*Cel-Tech*, *supra*, 20 Cal.4th at p. 187, 83 Cal.Rptr.2d 548, 973 P.2d 527.) RLH did not nip an illegal tying arrangement in the bud. PacBell's HVP policy does not risk harming competition because it allows customers to choose between leasing its HVP services or buying HVP devices from two independent suppliers. Even if some unfair competition causes of action can survive independently of an actual antitrust violation, this one does not. (*See Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 375, 113 Cal.Rptr.2d 175 ["If the same conduct is

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[2] RLH also contends Positron's free training is an unfair "kickback." But Positron offers its training to any current or prospective customer, without requiring recipients to buy its devices. There is nothing unfair about that.

alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason – because it unreasonably restrains competition and harms consumers – the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers"].)

In the same vein, RLH's intentional interference with economic advantage cause of action against PacBell fails. "[A] plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.'" (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, 45 Cal.Rptr. 2d 436, 902 P.2d 740.) "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159, 131 Cal.Rptr.2d 29, 63 P.3d 937.) PacBell's HVP policy violates no determinable legal standard, is not independently wrongful, and cannot support RLH's intentional interference cause of action.

SBC Was Not Entitled to Summary Judgment

Although the court properly granted summary judgment to PacBell, it erred in granting summary judgment to SBC. SBC does not argue its subsidiaries' HVP policies do not constitute a tying arrangement. As will be seen, SBC made the right tactical decision in directing its efforts elsewhere. Triable issues exist on that point.

Rather, SBC defends its summary judgment on two grounds the court did not reach: (1) it is not liable for its subsidiaries' HVP policies; and (2) the commerce clause restricts California law to regulating in-state conduct. The parties thoroughly briefed both issues below and on appeal; we require no additional briefing. We conclude SBC failed to show the nonexistence of triable issues as to

its liability for its subsidiaries' HVP polices, and its commerce clause argument misses the target.

A Triable Issue Exists as to Whether SBC Is Liable for Its Subsidiaries' HVP Policies

SBC failed to meet its summary judgment burden of making a prima facie showing no triable issue exists as to whether it is liable for its subsidiaries' HVP policies. Whether SBC is liable under either an agency or alter ego theory is a question of fact. (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1248, 1 Cal.Rptr.2d 301 [alter ego]; 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency, § 37, p. 50 [agency].) The only evidence SBC offers to show no triable issue exists as to these theories is the declaration of an SBC officer averring that SBC and PacBell are separate entities with separate boards of directors. The declaration says nothing about the relationship between SBC and its other subsidiaries, such as Ameritech. It lacks any value in showing no triable issues exist as to whether these subsidiaries are SBC's agents or alter egos. SBC thus failed to shift the burden of production on the agency and alter ego theories to RLH, and is not entitled to summary judgment on this ground.[3] (*Aguilar, supra*, 25 Cal.4th at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

The Commerce Clause Does Not Bar California's Antitrust and Unfair Competition Law from Reaching Out-of-State Conduct Injuring California Residents

SBC contends the commerce clause bars RLH's claims because California law cannot reach SBC's business practices in other states. "The commerce clause of the federal Constitution delegates to Congress the power '[t]o regulate Commerce with foreign Nations, and among the

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[3] We do not consider the SBC marketing material and Internet web pages that RLH cites in its appellate briefs, because RLH did not offer that material in opposition to SBC's summary judgment motion. (Code Civ. Proc., § 437c, subd. (c) [summary judgment motions are decided on "all the evidence set forth in the papers"].)

several States, and with the Indian Tribes.' (U.S. Const., art. I, § 8, cl. 3.) This explicit grant of power has been interpreted as an implied limitation on the power of states and local government to adopt statutes, regulations, and ordinances that burden or interfere with interstate commerce. [Citation.] Known as the 'dormant' or 'negative' commerce clause [citation], this limitation has been characterized as 'predicated upon the implications of the commerce clause itself, [citations], or upon the presumed intention of Congress, where Congress has not spoken . . . .' (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1608, 27 Cal.Rptr.3d 28.)

SBC contends the commerce clause sets a strict geographical limit on the reach of state law. According to SBC, California statutes such as the Cartwright Act and section 17200 cannot reach anticompetitive practices in other states, even if they cause injury in California.

SBC relies largely on *Healy v. Beer Institute* (1989) 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (*Healy*). In *Healy*, the United States Supreme Court set forth a "distillation of principles" regarding "the extraterritorial effects of state economic regulation." (*Id.* at pp. 336, 337, fn. 14, 109 S.Ct. 2491.) The first principle is that the "'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State . . . .'" (*Id.* at p. 336, 109 S.Ct. 2491.) SBC embraces this statement without hesitation, and uncritically asserts it bars RLH's claims.[4]

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[4] SBC also relies on *In re Brand Name Prescription Drugs* (7th Cir. 1997) 123 F.3d 599. But there, the court held federal antitrust law did *not* preempt state antitrust law, and directed the federal district court to remand the plaintiff's state law antitrust claims to the state court. (*Id.* at pp. 611-613.) The phrase SBC pulls from the case – "A state cannot regulate sales that take place wholly outside it. [Citation.] State *A* cannot use its antitrust law to make a seller in State *B* charge a lower price to a buyer in *C*" – is dicta. (*Id.* at p. 613.) Moreover, it does not reflect the allegations in this case. RLH seeks to use State A's

We cannot blindly wield the principle SBC cites without taking a closer look at the issue actually decided in *Healy*. *Healy* was the high court's "fourth expedition into the area of price-affirmation statutes." (*Healy*, *supra*, 491 U.S. at p. 331, 109 S.Ct. 2491.) It reviewed a Connecticut statute requiring out-of-state beer shippers to affirm they charged the same prices in Connecticut as in neighboring states. (*Id.* at p. 324, 109 S.Ct. 2491.) It relied upon or discussed previous cases reviewing price-affirmation and price-setting statutes. (*See Baldwin v. G.A.F. Seelig, Inc.* (1935) 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032; *Joseph E. Seagram & Sons, Inc. v. Hostetter* (1966) 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed.2d 336, disapproved in *Healy*, *supra*, 491 U.S. at p. 343, 109 S.Ct. 2491; *United States Brewers Assn. v. Healy* (2d Cir.1982) 692 F.2d 275; *Brown-Forman Distillers Corp. v. New York State Liquor Authority* (1986) 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552 (*Brown-Forman*).) It therefore focused on the commerce clause's prohibition against state laws controlling retail prices in other states. The principle that SBC cites – and always redacts with an ellipsis – goes on to say, "and, specifically, a State may not adopt legislation that has the practical effect of establishing 'a scale of prices for use in other states.'" (*Healy*, *supra*, 491 U.S. at p. 336, 109 S.Ct. 2491.)

Healy was *not* specifically concerned with the extraterritorial application of state antitrust laws. It did not review any such law, and it adopted the principle SBC cites from a non-antitrust case (*Edgar v. MITE Corp.* (1982) 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 [Illinois law requiring registration of takeover bids]), which in turn cited another non-antitrust case (*Southern Pac. Co. v. Arizona* (1945) 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 [Arizona law limiting train length].)

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antitrust law to make a competitor in State B stop anticompetitive practices that cause injury in State A.

That *Healy* did not specifically consider state antitrust laws is important, because its understanding of the commerce clause's purpose and scope may be consistent with giving extraterritorial effect to those laws. As for the commerce clause's purpose, *Healy* states, "the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." (*Healy, supra*, 491 U.S. at pp. 336-337, 109 S.Ct. 2491.) The state laws SBC challenges here cannot create any inconsistency by projecting California's prohibition of tying arrangements into other states, because the Sherman Act already bars tying arrangements throughout the land. (*See Northern Pacific, supra*, 356 U.S. at p. 7, 78 S.Ct. 514; *see also R.E. Spriggs Co. v. Adolph Coors Co.* (1974) 37 Cal.App.3d 653, 659, 112 Cal.Rptr. 585 ["the Cartwright Act . . . is complementary to the relevant provisions of the federal antitrust statutes"].)

As for the commerce clause's scope, *Healy* notes, "the critical consideration in determining whether the extraterritorial reach of a statute violates the Commerce Clause is the overall effect of the statute on both local and interstate commerce." (*Healy, supra*, 491 U.S. at p. 337, fn. 14, 109 S.Ct. 2491.) *Healy* concedes its "distillation of principles," including the principle SBC cites, "is meant as nothing more than a restatement of those specific concerns that have shaped this inquiry." (*Ibid.*) *Healy* cites *Brown-Forman* for these propositions, which in turn cites *Raymond Motor Transp., Inc. v. Rice* (1978) 434 U.S. 429, 440-441, 98 S.Ct. 787, 54 L.Ed.2d 664 (*Raymond Motor*). This leads to two conclusions.

First, the principle SBC cites restates the "specific concerns" that *price-affirmation statutes* have raised under the commerce clause. (*Healy, supra*, at p. 337, fn. 14, 109 S.Ct. 2491.) The principle does *not* replace a "sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed

on the course of interstate commerce." (*Raymond Motor, supra*, 434 U.S. at p. 441, 98 S.Ct. 787.)

Second, the commerce clause's primary concern is not geographic, but practical. It focuses on the balance between the state law's benefits to local commerce and its burdens upon interstate commerce, not simply on the location of the challenged conduct. (*Raymond Motor, supra*, 434 U.S. at p. 441, 98 S.Ct. 787, citing *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (*Pike*) ["Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits"].)

Thus, we cannot give *Healy* the same uncritical reading that SBC gives it. It is not clear that *Healy* necessarily bars state antitrust and unfair competition laws from reaching anticompetitive conduct occurring in other states, regardless of its effects on local residents. Although *Healy* distilled commerce clause jurisprudence to a few general principles for reviewing price affirmation statutes, it left the basic consideration of commerce clause jurisprudence intact: Taking everything into account, does the state law unreasonably burden interstate commerce? This calls for a fact-intensive balancing analysis – what *Raymond Motor* calls a "'delicate adjustment'" and "sensitive consideration" – not slogans and broad strokes. (*Raymond Motor, supra*, 434 U.S. at pp. 440-441, 98 S.Ct. 787; accord *Pike, supra*, 397 U.S. at p. 142, 90 S.Ct. 844.) SBC has not attempted to carefully balance the benefits of applying California law to their alleged out-of-state tying arrangements against the burden that condemning the tying arrangements under California law – which appears to be consistent with federal law; SBC notes no inconsistency – would impose on interstate commerce. (*See Pike*,

supra, 397 U.S. at p. 142, 90 S.Ct. 844.) We decline to do so for it.[5]

We conclude that the commerce clause, even as construed in *Healy*, does not necessarily prohibit state antitrust and unfair competition law from reaching out-of-state anticompetitive practices injuring state residents. No California case appears to be squarely on point. SBC cites *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 80 Cal.Rptr.2d 828, 968 P.2d 539 (*Diamond Multimedia*), but that case held only that the commerce clause does not bar nonresidents from invoking California securities law against California companies. (*Id.* at pp. 1063-1064, 80 Cal.Rptr.2d 828, 968 P.2d 539.) This falls far short of holding California antitrust law does not protect California residents from out-of-state anticompetitive conduct causing harm here.[6]

Our conclusion is bolstered by decisions from other jurisdictions. A federal district court held *Healy* does not bar application of Illinois' antitrust law to an out-of-state price-fixing scheme injuring an Illinois insurance company. (*In re Lorazepam & Clorazepate Antitrust Litigation* (D.D.C. 2003) 295 F.Supp.2d 30.) The court cited the same principle from *Healy* that SBC relies upon, but also cited *Pike's* balancing test. (*Id.* at pp. 48-49.) It found that "the scope of the Illinois Antitrust Act does not directly conflict with that of the Sherman Act" (*id.* at p. 49), and held that "the Illinois Antitrust Act extends not only to illegal antitrust activity that occurs wholly within

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[5] Even if we wanted to conduct a *Pike* balancing analysis for SBC, the record SBC developed for summary judgment would not allow us to do so at this time.

[6] The *Diamond Multimedia* court further noted that the California securities law in question permitted the same recovery already "allowed under federal securities law and we are unable to see how permitting [such] recovery under [California law] imposes any burden on interstate commerce. Quite the opposite." (*Diamond Multimedia*, *supra*, 19 Cal.4th at p. 1063, 80 Cal.Rptr.2d 828, 968 P.2d 539.) Similarly here, both California and federal law bar tying arrangements.

Illinois, but also to activity which may have effects in that state and which may have occurred, in part, outside of Illinois." (*Id.* at p. 48.) *Healy* was not dispositive.

Two other post-*Healy* federal courts have concluded California's antitrust and unfair competition laws can reach extraterritorial conduct causing injury in California, but without discussing *Healy*. (*Knevelbaard Dairies v. Kraft Foods, Inc.* (9th Cir. 2000) 232 F.3d 979, 993-994 [Cartwright Act reached Wisconsin price-fixing conspiracy artificially depressing prices in California, rejecting commerce clause argument]; *Churchill Village, L.L.C. v. General Elec. Co.* (N.D.Cal. 2000) 169 F.Supp.2d 1119, 1126-1127 [even though "California law embodies a presumption against the extraterritorial application of its statutes," California residents injured by out-of-state conduct could assert § 17200 claims against nonresident defendants].)

Other states have applied their antitrust laws to out-of-state conduct injuring their residents. In *Heath Consultants v. Precision Instruments* (1995) 247 Neb. 267, 527 N.W.2d 596 (*Heath*), the Supreme Court of Nebraska allowed a nonresident company to assert a state law antitrust claim against another nonresident company for an alleged tying arrangement perpetrated outside of Nebraska, but which ultimately affected Nebraska consumers. The *Heath* court rejected the defendant's commerce clause argument, concluding, "Inasmuch as the Nebraska act is consistent with federal law and there are ultimate inferences that the tying arrangement . . . had an impact upon local residents, the burden on interstate commerce cannot, at least at this point, be said to outweigh the interest of this state." (*Id.* at p. 607.) We could say the same here.

As a leading antitrust commentator observed, "no one doubts that state courts can reach persons located outside the forum state, or that state legislatures have the authority to condemn certain acts that take place outside the state." (Herbert Hovenkamp, *State Antitrust in the*

Federal Scheme (1983) 58 Ind. L.J. 375, 376, fn. omitted.) Because "[t]here is no evidence that Congress has ever wanted to prohibit extraterritorial assertions of state antitrust law," it follows that "the commerce clause does not limit substantially a state's power to apply its antitrust law to an out of state price-fixing conspiracy." (*Id.* at pp. 400-401.)

The weight of this authority leads us to reject SBC's contention the commerce clause prevents California antitrust and unfair competition law from reaching its allegedly anticompetitive HVP policies in other states, despite their effects on RLH. We conclude SBC failed to meet its summary judgment burden of showing a complete defense to RLH's complaint. (*Aguilar*, *supra*, 25 Cal.4th at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

On the other hand, we stop short of endorsing RLH's claim that because SBC concedes personal jurisdiction, no issues arise from applying California law to SBC's out-of-state conduct. To be sure, the inquiries share a family resemblance. "The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'" (*Edgar v. MITE Corp.*, *supra*, 457 U.S. at p. 643, 102 S.Ct. 2629.)

The propriety of applying California law to out-of-state conduct involves issues beyond personal jurisdiction, or even the commerce clause. These issues may include, without limitation, legislative intent, due process, and conflict of laws. (*Norwest Mortgage, Inc. v. Superior Court*, *supra*, 72 Cal.App.4th at pp. 222-227, 85 Cal.Rptr.2d 18 [legislative intent and due process]; *Washington Mutual Bank FA v. Superior Court* (2001) 24 Cal.4th 906, 919-920, 103 Cal.Rptr.2d 320, 15 P.3d 1071 [due process and choice-of-law].) Because SBC did not raise these issues below or on appeal, it waived them as a basis for affirming summary judgment. (*AICCO, Inc. v.*

Insurance Co. of North America (2001) 90 Cal.App.4th 579, 595, 109 Cal.Rptr.2d 359 [respondent waived choice of law issue by not analyzing it].) The conflict of law or due process issues may in turn require an in-depth analysis of the legal effect of the tariffs that SBC has filed with various state agencies. (See *City of Anaheim v. Pacific Bell Telephone Co.* (2004) 119 Cal.App.4th 838, 843-846, 14 Cal.Rptr.3d 725 [court lacked jurisdiction to hear tariff-based dispute over which Public Utility Commission had exclusive jurisdiction]; see also *Phonetele, Inc. v. American Tel. & Tel. Co.* (9th Cir.1981) 664 F.2d 716, 733-737 [federal and state tariffs did not immunize telephone companies' tying arrangements from antitrust scrutiny].) SBC mentioned the tariff issue only in a footnote with a single citation to *Healy*, and thus failed to offer the comprehensive legal analysis needed to affirm summary judgment on this ground. (See *In re Keisha T.* (1995) 38 Cal.App.4th 220, 237, fn. 7, 44 Cal.Rptr.2d 822; Cal. Rules of Court, rule 14(a)(1)(B).)

Accordingly, although we reject SBC's commerce clause argument, and reverse summary judgment in its favor, we express no opinion on potentially relevant issues not yet litigated, including a rigorous *Pike* analysis.

A Triable Issue Exists as to Whether SBC's HVP Policy Is a Tying Arrangement

We now turn to the merits of RLH's claims against SBC. As noted *ante*, SBC does not contend Ameritech's HVP policy is not a tying arrangement, and for good reason: triable issues abound as to whether a tying arrangement exists. RLH's evidence tended to show SBC, at least through its Ameritech subsidiary, requires customers to lease SBC's HVP services as a condition of providing local telephone service. Unlike PacBell, Ameritech forbids its customers from buying and installing their own HVP devices, whether from RLH or anyone else. This policy may constitute a tying arrangement. (*Northern Pacific, supra*, 356 U.S. at p. 7, 78 S.Ct. 514 [railroad illegally used its market power in real estate to force lessees

to send all shipping through railroad]; *International Salt Co. v. United States* (1947) 332 U.S. 392, 395-398, 68 S.Ct. 12, 92 L.Ed. 20 [defendant illegally tied salt sales to leases of its patented salt-dispensing machines].)

The court erred in relying on the lack of any anticompetitive agreement between SBC and other HVP device makers. The law forbids not just tying agreements between different parties; it forbids any tying "arrangement or condition." (*Morrison, supra*, 66 Cal.App.4th at p. 541, 78 Cal.Rptr.2d 133.) It is sufficient that SBC linked its local telephone service to its own HVP service, regardless of whether SBC had any anticompetitive agreement with, or financial interest in, the makers of the HVP devices it used to provide that HVP service. (See *Carl Sandburg, supra*, 758 F.2d at p. 208 ["In the usual tying arrangement, it is not difficult to establish the economic interest element because the seller of the tying product is also the seller of the tied product"].)

Triable issues also exist as to the other three elements of an illegal tying arrangement. On appeal, SBC does not dispute Ameritech and its other subsidiaries have market power in the tying product, local telephone service; its subsidiaries' HVP policies affect a substantial amount of sales in the HVP market; and RLH suffered pecuniary losses therefrom. It thus waived these issues. (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 973, fn. 3, 132 Cal.Rptr.2d 635.) At any rate, the evidence tended to show Ameritech's share in the local telephone market ranges from 74 percent to 87 percent in the five states comprising the Midwest region. At least one Ameritech customer, Cinergy Corporation, would prefer to use RLH devices in its new facilities, but instead leases Ameritech's HVP services due to its HVP policy. This evidence, while not overwhelming, raises triable issues sufficient to survive summary judgment.

DISPOSITION

The judgment in favor of PacBell is affirmed. It shall recover its costs on appeal. The judgment in favor of SBC is reversed. No costs are awarded to SBC or RLH in this interim proceeding, but may be assessed in the discretion of the superior court on behalf of the party ultimately prevailing below.

WE CONCUR:

RYLAARSDAM, Acting P.J., and O'LEARY, J.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

MINUTE ORDER

Department: C13

COURT CONVENED AT: **ON:** 9-2-04
JUDGE/COMM: WILLIAM M. MONROE **CLERK:** DENISE DREHSEN
BAILIFF: NONE **REPORTER:** NONE

AND THE FOLLOWING PROCEEDINGS WERE HAD:

02CC16869 RLH INDUSTRIES VS. SBC COMMUNICATIONS

No appearances.

MOTION FOR SUMMARY JUDGMENT/SAI ON THE PLAINTIFF'S 3RD CAUSE OF ACTION.

THE COURT HAVING TAKEN THIS MATTER UNDER SUBMISSION ON 8-17-04 RULES AS FOLLOWS:

The remaining issue is whether to grant or deny Motion for Summary Judgment as to SBC. The claims against SBC are an illegal tying agreement under B&P 16720, violation of B&P 17200 based on same conduct and interference with Prospective Economic Advantage.

Although the parties spend the time on whether the court has jurisdiction, the matter appears settled given the appellate review in this case.

The main issue is whether there is a triable issue regarding a tying agreement. Assuming the separate products in separate markets exist, a plaintiff claiming an illegal tying arrangement must plead: "(1)a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; (2) the party has sufficient economic power in the tying market to coerce the purchase of the tied product; and

(3) a substantial amount of sale was effected in the tied product."

As to whether there was a tying agreement SBC relies on UF 12 which is supported by declaration of Curran (Ex. 13) Curran is senior contract manager for SBC Services, Inc. He declares that there is no agreement with SBC Services to exclude RLH services. Plaintiff does not dispute this fact, but claims it is immaterial.

As to whether SBC had sufficient economic power, that appears to have been conceded.

As to the third element requiring a substantial amount of sale effected in the tied market, SBC relies on UF 17 for proposition that plaintiff relies on mere inference that markets were affected. Plaintiff did not dispute the UF and merely claims that it is immaterial. The facts in support of UF 17 shows discovery responses from plaintiff, which did not establish size of market or effect on the market.

As to the tying agreement, the opposition states that additional facts 42-50 provide facts upon which to infer there was improper tying agreement, but such an inference does not appear from said facts. Nor does plaintiff even establish in the additional facts the market share or effect on the market.

Plaintiff tries to establish a financial interest for SBC to refuse using RLH, via Positron training courses, but no showing that it was a quid pro quo, or that $100,000 worth of training swayed SBC to alter its practices in 13 states.

As the Cartwright Act fails, the B&P 17200 claims based on the same acts appears to fail.

As to the cause of action for intentional interference with prospective economic advantage, the moving papers rely on UF 7-11 and 18. While plaintiff may have established an example of interference with its additional fact #33, the failure of the Cartwright act deprives plaintiff of the required wrongful conduct beyond causing the interfer-

ence required by Della Penna (1995) 11 Cal. 4th 376. As there was no wrongful act causing the interference, the claim fails as well.

The Court ruling is as follows: Motion for summary judgment in favor of Pacific Bell is granted.

The Motion for summary judgment in favor of SBC is granted.

Moving party to give notice./Entered: 9-2-04

The Court's ruling posted on the Internet this date.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

Case No. 02CC16869

RLH INDUSTRIES, INC., A CALIFORNIA CORPORATION,
Plaintiff,

v.

SBC COMMUNICATIONS, INC., PACIFIC BELL TELEPHONE COMPANY, AND DOES 1 THROUGH 100, INCLUSIVE,
Defendants.

[Filed Apr. 24, 2003]

SECOND AMENDED COMPLAINT FOR (1) CARTWRIGHT ACT VIOLATIONS; (2) UNFAIR COMPETITION; AND (3) TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

Plaintiff RLH Industries, Inc. (hereinafter "RLH"), submits its second amended complaint against the defendants, as follows:

JURISDICTION AND VENUE

1. This second amended complaint is filed and this action is instituted under, *inter alia*, the Cartwright Act, Cal. Bus. & Prof. Code, §§ 16720 et seq., to recover treble damages, injunctive relief, and costs, including reasonable attorneys' fees, from the defendants for the injuries RLH has suffered and will continue to suffer as a consequence of defendants' violations of Sections 16720 (a-c) 16726, and 16727 of the Cartwright Act.

2. The alleged violations of law and unlawful acts described in this complaint have been created and carried on, in part, in this County.

3. The defendants named below carry on substantial, continuous and systematic business in this state and county by marketing, advertising, offering for sale, selling and providing and/or installing, among other things, local and long distance telecommunications services to business and residential customers in this state and county.

PLAINTIFF

4. RLH, the plaintiff herein, is a California corporation with its headquarters office and principal place of business in Orange, California. RLH is engaged in the business, among other things, of manufacturing and selling high voltage protection equipment designed to isolate telecommunication lines in high voltage areas that are susceptible to Ground Potential Rise (hereinafter "GPR").

DEFENDANTS

5. SBC Communications, Inc. (hereinafter "SBC"), a defendant herein, is a Delaware corporation with its principal place of business in San Antonio, Texas. SBC is a telecommunications company which provides, among other things, long distance telecommunications service in California and other states and, through operating subsidiaries, local telephone service in various states throughout the United States. These operating subsidiaries include without limitation Southwestern Bell Telephone L.P. which provides local telephone service to subscribers in the states of Texas, Kansas, Missouri, Oklahoma and Arkansas and Ameritech Corporation which provides local telephone service to subscribers in the states of Illinois, Indiana, Michigan, Ohio and Wisconsin through various affiliated operating entities including Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, Ohio Bell Telephone Company and Wisconsin Bell, Inc.

6. Pacific Bell Telephone Company (hereinafter "PacBell"), a defendant herein, is a California corporation with its principal place of business in California. PacBell, a subsidiary of SBC, provides local telephone service to subscribers in California.

7. The true names and capacities, whether individual, corporate, associate or otherwise, of defendants Does 1 through 100, inclusive, are presently unknown to RLH who therefore sues said defendants by such fictitious names. RLH is informed and believes, and on that basis alleges, that Does 1 through 100, inclusive, are in some manner legally responsible and culpable in connection with the matters alleged below. RLH will seek leave of Court to amend this second amended complaint to identify the true names and capacities of the fictitiously named defendants when the same have been ascertained.

8. RLH is informed and believes, and on that basis alleges, that all Defendants herein were at all relevant times acting as agents, principals, partners, joint venturers, employees and servants for each other and that all acts alleged against Defendants herein were undertaken in the course and scope of said agency and employment and that each defendant is legally responsible and culpable for the acts and omissions of all other defendants.

CO-CONSPIRATORS

9. Other individuals, firms, and corporations have participated as co-conspirators with defendants in the violations of law and tortious conduct hereinafter alleged, and have performed acts and made statements in furtherance thereof.

THE BELL OPERATING SYSTEM AND DIVESTITURE

10. During the early part of its approximate 120-year history, the telephone industry experienced varying periods of competition, monopolization, and regulation. By 1934, the Belt System, consisting of Bell Operating Companies, along with American Telephone and Telegraph Company ("AT&T"), owned 80 percent of all the local telephone lines and services in the United States and owned a monopoly long-distance network. The Bell Operating Companies were wholly-owned subsidiaries of AT&T.

11. In 1934, the Communications Act of 1934 was adopted. That act severed regulation of the telephone industry from the Interstate Commerce Commission and

provided for the creation of the Federal Communications Commission ("FCC") to regulate interstate telephone, telegraph and radio companies. Interstate and international telephone services fell under the aegis of the FCC, and intrastate telephone services became regulated under the auspices of respective state commissions. Once a telephone communications service crossed a state line, it fell under the jurisdiction of the FCC.

12. In 1974, the United States filed a lawsuit against AT&T alleging that it had monopolized and conspired to restrain trade in the manufacture, distribution, sale and installation of telephones, telephone apparatus equipment and materials and supplies in violation of Sections 1, 2, and 3 of the Sherman Act, 15 U.S.C. § 1, 2, and 3. The basic theory of the government's case, as explained by the District Court, was that AT&T had unlawfully used its control-of local exchange facilities to suppress competition in related markets, such as the markets for long distance services, which are dependent upon access to the local exchange to originate and terminate calls. *United States v. AT&T*, 524 F. Supp. 1336, 1352 (D.D.C. 1981).

13. In 1982, the United States and AT&T agreed to settle the case through the entry of a consent decree. In 1982, United States District Court Judge Harold H. Greene signed the Modified Final Judgment, settling the antitrust suit against AT&T. The Modified Final judgment was based on divestiture; AT&T was required to divest itself of its twenty-two Bell Operating Companies ("BOCs"). The BOCs provided the means by which local telephone service was furnished. Bell customers gained access to the network for both local and long distance telecommunications service through the BOCs. The Modified Final Judgment, however, imposed certain business restrictions on the newly divested BOCs. Specifically, the BOCs were prohibited from providing interLATA services (which are long distance services involving calls that terminated outside the "local access and transport area" in which they originate, as defined in the Modified Final Judgment), or any non-telecommunications services, and

from manufacturing telecommunications equipment. In addition, the Modified Final Judgment required the BOCs to provide all interexchange carriers (i.e., long distance providers) with exchange access that was equal in type, quality, and price to the access provided to AT&T. *United States v. AT&T*, 532 F. Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S. Ct. 1240, 75 L.Ed. 2d 472 (1983).

14. On January 1, 1984, divestiture of the Bell System by AT&T took effect. AT&T divested the seven Regional Bell Operating Companies ("RBOCs") and exited the local telephone business. The RBOCs were barred from providing long distance services. The seven RBOCs became known as the baby Bells and included, among others, Ameritech; SBC Communications, and Pacific Telesis. SBC became the parent corporation of Southwestern Bell, and Pacific Telesis became the parent corporation of Pacific Bell and Nevada Bell. SBC and Pacific Telesis merged in early 1997.

15. Local telephone companies such as the Bell Operating Companies are commonly referred to as local exchange carriers ("LECs") and provide business and residential customers with local telephone services.

16. In addition to the Bell Operating Companies, there are other local exchange carriers operating in the United States. These local exchange carriers generally offer the same services as the Bell Operating Companies. Local exchange carriers historically operated in their local franchise areas free of competition, pursuant to exclusive franchises granted by state regulatory authorities.

17. On February 8, 1996, the Telecommunications Act of 1996 became law. The Act amends the Communications Act of 1934. (See 47 U.S.C. § 609, Historical and Statutory Notes.). The Act introduced the possibility of local service competition against incumbent LECs ("ILECs") by requiring them, *inter alia*, to provide access and connections to their lines and equipment on just, reasonable and non-discriminatory terms. However, as of

this date the ILECs, including for all practical purposes have avoided local service competition.

18. Defendants and their operating subsidiary LECs dominate and control essential facilities consisting of, but not limited to, local telephone lines, equipment, transmission and central switching stations (central office); and "local loop." A "local loop" is the wire line – twisted pair of copper wires, coaxial cable, fiber optic cable or the like – that links the customer's premises to a central switching station from which calls are routed to their final destination. Within the relevant markets defined below companies that typically require high voltage protection equipment have no practical alternative to using defendants for their primary telecommunications service.

HIGH VOLTAGE PROTECTION EQUIPMENT

19. High voltage environments associated with power substations, plants and distribution sites, PCS/Wireless sites, high voltage towers, emergency 911 locations and microwave communication facilities are susceptible to dangerous levels of GPR due to lightning or voltage surges. GPR can cause serious damage to telephone lines and associated equipment, interrupt communications and endanger personnel working at these sites. High voltage protection equipment is designed for customers who purchase from LECs exchange and private line services located at or near these sites. This equipment is used to isolate or neutralize hazardous voltages that could appear at telephone network terminating equipment due to GPR or induction resulting from faults in the electric power system. Defendants require installation of high voltage protection equipment by or for all customers utilizing equipment and facilities susceptible to dangerous levels of GPR.

20. Only a few companies including RLH, Positron Industries ("Positron") and SNC Manufacturing Co., Inc. ("SNC") manufacture high voltage protection equipment for the purposes referred to in paragraph 19, above.

RLH's equipment is fiber optic whereas most Positron and SNC equipment is transformer-based.

21. RLH's high voltage protection equipment is generally simpler to install, comparable in cost and provides superior isolation to competitors' transformer-based equipment referred to in paragraph 20, above. High on the list of reasons for RLH's actual and prospective customers requesting RLH's high voltage protection equipment is avoidance of the inherent safety hazards of transformer-based equipment which requires running a remote ground (copper telephone line) into a high voltage environment. RLH equipment users eliminate this danger by replacing the copper telephone line entering into their high voltage areas with an all dielectric (non-conductive) fiber optic line. RLH's high voltage protection equipment has been approved for use by various LECs throughout the United States, and has been and is being used by RLH's customers at locations outside defendants' territories in most states of the United States.

22. Despite the quality, safety and cost benefits of RLH's high voltage protection equipment over competitors' equipment, and its approval for use by various LECs unaffiliated with defendants throughout the United States, RLH's customers who prefer to use RLH's high voltage protection equipment as well as prospective customers of RLH who have expressed serious interest in acquiring RLH's equipment repeatedly have been informed by defendants SBC and PacBell and their affiliated operating companies including without limitation Southwestern Bell, Ameritech and LECs under their control that (a) they are not allowed to use RLH's equipment because it is not approved for use as high voltage protection equipment or (b) they are only allowed to use Positron or SNC high voltage protection equipment or (c) they refuse to "power" RLH's equipment. As just two examples within the last two years, and there are myriad others, Voicestream (now known as T-Mobile) wanted to use RLH's high voltage protection equipment on multiple cellular sites in the Dallas-Fort Worth area. Defendant SBC informed

Voicestream's representative that it had no tariff for such equipment and SBC saw no need to change its practice notwithstanding that Voicestream would own the equipment and be responsible for its maintenance. Likewise, Sprint PCS wanted to use RLH's high voltage protection equipment on PCS sites in the Los Angeles area. Sprint PCS's representative was informed by defendant PacBell that RLH's equipment was not approved and Sprint PCS could not use the product.

23. On information and belief, defendants and their affiliated operating companies have received benefits of substantial financial value from Positron and SNC. Such benefits include, *e.g.* Positron's bankrolling of "free" high voltage protection training classes for employees of defendants and their affiliated operating companies. The annual value of this benefit to defendants is estimated to exceed $100,000.

24. Defendant SBC decides and dictates to its various affiliated operating company LECs which manufacturers' high voltage protection equipment is approved for use on SBC's system. In this connection, defendant SBC put Don Murray in charge of the approval process. RLH was directed to Murray for approval of its high voltage protection equipment by PacBell, Southwestern Bell, Ameritech and various LECs in SBC's system. Throughout most of the relevant period, Murray was employed by PacBell and/or SBC and worked in San Ramon, California. Despite RLH's substantial efforts to win SBC's approval through Murray, SBC made excuse after excuse but still refused to approve RLH's high voltage protection equipment for use on SBC's system.

THE RELEVANT PRODUCT/SERVICE MARKET

25. The relevant "tying" product/service market consists of local exchange telecommunications service as hereinbefore described in paragraphs 15 through 18 of the second amended complaint. The relevant "tied" product market comprises the sale and installation of high voltage protection equipment to electric utilities, PCS/wireless

companies and other business entities as hereinbefore described in paragraph 19, above. There are no reasonable substitutes for such equipment.

THE RELEVANT GEOGRAPHIC MARKET

26. Each and all of the territories in the states of California, Nevada, Texas, Oklahoma, Missouri, Kansas, Arkansas, Indiana, Ohio, Wisconsin, Illinois, Michigan and Connecticut where electric utilities, PCS/wireless companies and other business organizations with equipment and facilities requiring high voltage protection equipment rely upon defendants and/or their affiliated operating companies for (a) local exchange telecommunications services and (b) acquisition or source-approval of high voltage protection equipment constitute the relevant geographic markets herein. These territories include, on information and belief, upwards of eighty to 100 percent of the business lines within these states. Within these territories, Positron is estimated to possess a high voltage protection equipment market share of approximately 80%.

FIRST CAUSE OF ACTION

Violation of Cartwright Act, B & P Code § 16720 (a)

(*Per Se* Tying Arrangement Against Defendants)

27. Paragraphs 1 through 26 of this second amended complaint are incorporated herein by reference as if fully set forth herein.

28. Beginning at a date unknown to RLH but for many years and continuing through the present, defendants have entered into tying arrangements in violation of Section 16720 (a) and 16726 of the Cartwright Act. The essential term of these arrangements is and has been that defendants have made the provision of local exchange telecommunications service (tying product/service) to electric utilities, PCS/wireless companies and certain other customers contingent upon such customers purchasing high voltage protection equipment (tied product) from defendants or from a source approved by defendants.

29. As aforesaid in paragraphs 15 through 18, above, defendants and affiliated operating companies possess

monopoly power over local exchange telecommunications service in the geographic areas identified in paragraph 26 of the second amended complaint. Their monopoly power over local exchange telecommunications service (the "tying" product) prevents electric utilities, PCS/wireless companies and other customers of these LECs from switching to another local exchange carrier.

30. Local exchange telecommunications service is a separate product from high voltage protection equipment. Defendants have exploited their monopoly power in the market for local exchange telecommunications services by requiring electric utilities, PCS wireless companies and other business entities to purchase and install Positron or SNC high voltage protection equipment sold or approved for use by defendants instead of allowing such customers to install high voltage protection equipment they would have preferred to purchase from RLH.

31. As aforesaid, defendants, on information and belief, have benefitted financially from the sources of high voltage protection equipment they have approved.

32. There is no reasonable business justification for defendants' aforesaid conduct. RLH's high voltage protection equipment is high quality equipment that has been approved for use by ILECs that are unaffiliated with defendants. As aforesaid, RLH's equipment eliminates the serious safety hazards that are inherent in the use of transformer-based equipment manufactured by Positron and SNC. In isolated instances even defendants have made exceptions to the rule for certain customers by allowing the use of RLH's equipment on a "one time approval" basis.

33. Competition in the sale and installation of high voltage protection equipment has been unduly restricted; consumers, deprived of the benefits of free and open competition, have been forced to accept Positron or SNC high voltage protection equipment instead of RLH's superior equipment and have been forced to pay artificially inflated prices for such equipment and its installation.

34. Defendants' aforesaid conduct has had a substantial impact on the tied product market. On information and belief, the total amount of commerce that has been tied by the aforesaid tying arrangement, represented predominately by Positron high voltage protection equipment installed in defendants' territories, is in the tens of millions of dollars.

35. As a result of the foregoing, RLH has suffered, continues to, and for the reasonably foreseeable future will suffer injury to its business and property including lost profits in an amount that has not yet been determined, but in the millions of dollars.

SECOND CAUSE OF ACTION

Violation of Cartwright Act, B & P Code § 16720 (a)

(Tying Arrangement in Violation of Rule of Reason Against Defendants)

36. Paragraphs 1 through 35 of this second amended complaint are incorporated herein by reference as if fully set forth herein.

37. Beginning at a date unknown to RLH but for many years and continuing through the present, defendants have entered into tying arrangements in violation of Section 16720 (a) and 16726 of the Cartwright Act. The essential term of these arrangements is and has been that defendants have made the provision of local exchange telecommunications service (tying product/service) to electric utilities, PCS/wireless companies and certain other customers contingent upon such customers purchasing high voltage protection equipment (tied product) from defendants or from a source approved by defendants.

38. As aforesaid in paragraphs 15 through 18, above, defendants and affiliated operating companies possess monopoly power over local exchange telecommunications service in the geographic areas identified in paragraph 26 of the second amended complaint. Their monopoly power over local exchange telecommunications service prevents electric utilities, PCS/wireless companies and

other customers of these LECs from switching to another local exchange carrier.

39. Local exchange telecommunications service is a separate product from high voltage protection equipment. Defendants have exploited their monopoly power in the market for local exchange telecommunications services by requiring electric utilities, PCS wireless companies and other business entities to purchase and install Positron or SNC high voltage protection equipment sold or approved for use by defendants instead of allowing such customers to install high voltage protection equipment they would have preferred to purchase from RLH.

40. As aforesaid, defendants, on information and belief, have received benefits of substantial financial value from the sources of high voltage protection equipment they have approved.

41. There is no legitimate business justification for defendants' aforesaid conduct. RLH's high voltage protection equipment is high quality equipment that has been approved for use by various ILECs that have no affiliation with defendants. As aforesaid, RLH's equipment eliminates the serious safety hazards that are inherent in the use of transformer-based equipment manufactured by Positron and SNC. In isolated instances even defendants have made exceptions to the rule for certain customers by allowing the use of RLH's equipment on a "one time approval" basis.

42. Competition in the relevant market comprising the sale and installation of high voltage protection equipment in the relevant geographic markets delineated in paragraph 26 of the second amended complaint has been unreasonably restricted. As such, customers in the aforesaid relevant markets who are required to have high voltage protection equipment installed have been deprived of the benefits of free and open competition and forced to pay artificially high prices. Competition between and among RLH, Positron and SNC has been substantially lessened

and unreasonably restricted and artificial barriers have been erected to effective entry into the relevant market.

43. As a result of the foregoing, RLH has suffered, continues to, and for the reasonably foreseeable future will suffer injury to its business and property including lost profits in an amount that has not yet been determined, but in the millions of dollars.

THIRD CAUSE OF ACTION

Violation of Unfair Competition Act, B & P Code § 17200 et seq.

(Against All Defendants)

44. Paragraphs 1 through 43 of this second amended complaint are incorporated herein by reference as if fully set forth herein.

45. The acts of defendants described in preceding paragraphs of this second amended complaint including without limitation paragraphs 28 through 30, above, constitutes "unlawful or unfair business practices in violation of California's Unfair Competition Act, Cal. Bus. & Prof. Code, §§ 17200 et seq.

46. Defendants' acceptance of such benefits as "free" high voltage protection training for their employees from RLH's competitors constitute "kickbacks" or commercial bribery and are further acts of unlawful or unfair business practices in violation of California's Unfair Competition Act, Cal. Bus. & Prof. Code, §§ 17200 et seq.

47. Defendant SBC's representation that RLH would receive SBC's approval if it obtained CLEI codes for its products and its failure to grant such approval after RLH spent approximately $23,000 for such codes is a further act of unlawful or unfair business practices in violation of California's Unfair Competition Act, Cal. Bus. & Prof. Code, §§ 17200 et seq.

48. Defendants' requirement that their customers use transformer-based equipment and preclusion of their use of RLH's equipment knowing that use of the former equipment, particularly in high lightning areas, can cause

serious injury and death constitutes further acts of unlawful or unfair business practices in violation of California's Unfair Competition Act, Cal. Bus. & Prof. Code, §§ 17200 et seq.

49. RLH seeks injunctive and restitutive relief under Business and Professions Code Section 17200 et seq. to remedy the unfair, unlawful and/or fraudulent business practices described herein, including the following:

a. Restitution and/or disgorgement of unlawful profits obtained by defendants and their affiliated operating companies from their unlawful and unfair practices as described herein;

b. An order requiring defendants and their affiliated operating to cease the conduct alleged in Paragraph 25 above;

c. An order requiring defendants and their affiliated operating companies to approve RLH's high voltage protection equipment for use in their territories and enjoining defendants from taking any steps to stop or prevent RLH's customers or potential customers from using and installing RLH's high voltage protection equipment;

d. An order requiring defendants to notify all of their constituent companies and divisions that RLH may, without any adverse repercussions, reactions, penalties or conduct from defendants sell and install its high voltage protection equipment for any entity desiring to purchase such equipment; and

e. An order requiring defendants to publicize that RLH's high voltage protection equipment may be used in all of the territories in which defendants have affiliated companies operating as LECs. Said publicity shall be approved by RLH in advance, and shall be distributed at least as widely and as visibly as defendants' conduct requires.

FOURTH CAUSE OF ACTION

Interference with Prospective Economic Advantage

(Against All Defendants)

50. Paragraphs 1 through 49 of this second amended complaint are incorporated by reference as if fully set forth herein.

51. RLH has established business relations with electric utilities, PCS/wireless companies and other business entities who require high voltage protection equipment including such leading companies as Nextel, Sprint, Cingular, and T-Mobile (formerly Voicestream). These companies have purchased such equipment from RLH and had it installed in areas outside the markets in which defendants and their affiliated operating companies are LECs and have expressed their preference to use RLH's equipment in markets in which defendants or their affiliated operating companies are LECs.

52. At all relevant times, defendants have been aware of RLH's actual and prospective business relationships with such customers.

53. Defendants have intentionally and wrongfully interfered with RLH's prospective economic relationships with the aforesaid actual and prospective customers, without legitimate business justification, by, among other things, (a) exploiting their inordinate leverage over the provision of local exchange services, (a market in which RLH does not and could not reasonably compete); (b) accepting kickbacks or commercial bribes such as free high voltage protection training for their employees as aforesaid; (c) requiring RLH's customers to purchase Positron or SNC high voltage protection equipment instead of RLH's; (d) requiring their customers to use transformer-based equipment and precluding them from using RLH's fiber optic equipment knowing that use of the former equipment, particularly in high lightning areas, can cause serious injury and death; and (e) misrepresenting that RLH would receive SBC's approval for the use of its equipment if it obtained CLEI codes for its products and

then failing to grant such approval after RLH spent approximately $23,000 for such codes.

54. Defendants' interference with RLH's actual and prospective relationships has been and is intentional and wrongful. It constitutes unfair conduct outside the realm of legitimate business transactions.

55. As a result of the foregoing, RLH has suffered, continues to, and for the reasonably foreseeable future will suffer damage including lost profits in an amount that has not yet been determined.

PRAYER FOR RELIEF

WHEREFORE, RLH requests the following relief:

(1) That the conduct alleged in the first and second causes of action be adjudged to be in violation of Sections 16720 (a) and 16726 of the Cartwright Act;

(2) That the plaintiff recover three times the damages determined to have been sustained by it, and that joint and several judgments be entered against defendants, and each of them for the amount determined for violations of the antitrust laws, as alleged in the first and second causes of action in an amount to be proven at trial;

(3) That as to the third cause of action, the Court order the following injunctive and restitutive relief under Business and Professions Code Section 17200 et seq.:

a. Restitution and/or disgorgement of unlawful profits obtained by defendants and their affiliated operating companies from their unlawful and unfair practices as described herein;

b. An order requiring defendants and their affiliated operating companies to cease the conduct alleged in Paragraph 25 above;

c. An order requiring defendants and their affiliated operating companies to approve RLH's high voltage protection equipment for use in their territories and enjoining defendants from taking any steps to stop or prevent RLH's customers or potential customers from using and installing RLH's high voltage protection equipment;

d. An order requiring defendants to notify all of their constituent companies and divisions that RLH may, without any adverse repercussions, reactions, penalties or conduct from defendants sell and install its high voltage protection equipment for any entity desiring to purchase such equipment; and

e. An order requiring defendants to publicize that RLH's high voltage protection equipment may be used in all of the territories in which defendants have affiliated companies operating as LECs. Said publicity shall be approved by RLH in advance, and shall be distributed at least as widely and as visibly as defendants' conduct requires.

(4) That RLH recover damages in the amount sustained by it for defendants' wrongful interference with actual and/or prospective economic advantage, as alleged in the fourth cause of action, and that joint and several judgments be entered against defendants, and each of them, in an amount to be proven at trial.

(5) That RLH recover punitive damages in accordance with proof at trial, with respect to the fourth cause of action, and that joint and several judgments be entered against the defendants, and each of them, for the amount determined.

(6) That RLH recover the costs of this suit, together with a reasonable attorneys' fee, as well as prejudgment and post judgment interest.

(7) That RLH have such other and further relief as the nature of this case may require and the Court may deem just and proper.

JURY DEMAND

Plaintiff demands trial by jury on all causes of action as to which plaintiff is entitled to jury trial.

DATED: April 22, 2003

Respectfully Submitted,

/s/ RICHARD S. PRICE

Richard S. Price, II, Attorney for
Plaintiff RLH INDUSTRIES, INC.

STATUTORY PROVISIONS INVOLVED

The Cartwright Act, Cal. Bus. & Prof. Code §§ 16720-16728, provides:

§ 16720. A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce.

(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

§ 16721. Recognizing that the California Constitution prohibits a person from being disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin, and guarantees the free exercise and enjoyment of religion without discrimination or preference; and recognizing that these and other basic, fundamental constitutional principles are directly affected and denigrated by certain on-going practices in the business and commercial world, it is necessary that provisions protecting and enhancing a person's right to enter or pursue business and to freely exercise and enjoy religion, consistent with law, be established.

(a) No person within the jurisdiction of this state shall be excluded from a business transaction on the basis of a policy expressed in any document or writing and imposed by a third party where such policy requires discrimination against that person on the basis of the person's sex, race, color, religion, ancestry or national origin or on the basis that the person conducts or has conducted business in a particular location.

(b) No person within the jurisdiction of this state shall require another person to be excluded, or be required to exclude another person, from a business transaction on the basis of a policy expressed in any document or writing which requires discrimination against such other person on the basis of that person's sex, race, color, religion, ancestry or national origin or on the basis that the person conducts or has conducted business in a particular location.

(c) Any violation of any provision of this section is a conspiracy against trade.

(d) Nothing in this section shall be construed to prohibit any person, on this basis of his or her individual ideology or preferences, from doing business or refusing to do business with any other person consistent with law.

§ 16721.5. It is an unlawful trust and an unlawful restraint of trade for any person to do the following:

(a) Grant or accept any letter of credit, or other document which evidences the transfer of funds or credit, or enter into any contract for the exchange of goods or services, where the letter of credit, contract, or other document contains any provision which requires any person to discriminate against or to certify that he, she, or it has not dealt with any other person on the basis of sex, race, color, religion, ancestry, or national origin, or on the basis of a person's lawful business associations.

(b) To refuse to grant or accept any letter of credit, or other document which evidences the transfer of funds or credit, or to refuse to enter into any contract for the exchange of goods or services, on the ground that it does not contain such a discriminatory provision or certification.

The provisions of this section shall not apply to any letter of credit, contract, or other document which contains any provision pertaining to a labor dispute or an unfair labor practice if the other provisions of such letter of credit, contract, or other document do not otherwise violate the provisions of this section.

For the purposes of this section, the prohibition against discrimination on the basis of a person's business associations shall be deemed not to include the requiring of association with particular employment or a particular group as a prerequisite to obtaining group rates or discounts on insurance, recreational activities, or other similar benefits.

For purposes of this section, "person" shall include, but not be limited to, individuals, firms, partnerships, associations, corporations, and governmental agencies.

§ 16721.6. It is the intent of the Legislature that Sections 16721 and 16721.5 be interpreted and applied so as not to conflict with federal law with respect to transactions in the interstate or foreign commerce of the United States to the extent, if any, not preempted by the Export Administration Act of 1969 as amended (50 U.S.C. App. Sec. 2401 and following) and any regulations promulgated thereunder.

§ 16722. Any contract or agreement in violation of this chapter is absolutely void and is not enforceable at law or in equity.

§ 16725. It is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade.

§ 16726. Except as provided in this chapter, every trust is unlawful, against public policy and void.

§ 16727. It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State.

§ 16728. (a) Notwithstanding any other provision of law, motor carriers of property, as defined in Section 34601 of the Vehicle Code, may voluntarily elect to participate in uniform cargo liability rules, uniform bills of lading or receipts for property being transported, uniform cargo credit rules, joint line rates or routes, classifications, mileage guides, and pooling. Motor carriers of property that so elect shall comply with all requirements of Section 14501(c) of Title 49 of the United States Code and with federal regulations promulgated pursuant to that section. The Legislature intends by this section to provide to motor carriers of property the antitrust immunity authorized by state action pursuant to Section 14501(c) of Title 49 of the United States Code.

(b) The election authorized by this section shall be exercised in either of the following ways:

(1) Participation in an agreement pursuant to Section 13703 of Title 49 of the United States Code.

(2) Filing with the Department of Motor Vehicles a notice of adoption of any or all of the uniform cargo liability rules, uniform bills of lading or receipts for property being transported, uniform cargo credit rules, joint rates or routes, classifications, mileage guides, and pooling contained in an identified publication authorized by Section 13703 of Title 49 of the United States Code, along with a written certification issued by the organization establishing those uniform rules or provisions in accordance with Section 13703(g)(1)(B) of Title 49 of the United States Code, affirming participation of the motor carrier of property in the collective publication. The certification shall be made available for public inspection.

(c) The elections made by a motor carrier of property pursuant to this section may be canceled by the motor carrier.

The Unfair Competition Act, Cal. Bus. & Prof. Code §§ 17200-17210, provides:

§ 17200. As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

§ 17201. As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

§ 17201.5. As used in this chapter:

(a) "Board within the Department of Consumer Affairs" includes any commission, bureau, division, or other similarly constituted agency within the Department of Consumer Affairs.

(b) "Local consumer affairs agency" means and includes any city or county body which primarily provides consumer protection services.

§ 17202. Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.

§ 17203. Injunctive Relief – Court Orders

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

§ 17204. Actions for Injunctions by Attorney General, District Attorney, County Counsel, and City Attorneys

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition.

§ 17204.5. In addition to the persons authorized to bring an action pursuant to Section 17204, the City Attorney of the City of San Jose, with the annual consent of the Santa Clara County District Attorney, is authorized to prosecute those actions.

This section shall remain in effect until such time as the population of the City of San Jose exceeds 750,000, as determined by the Population Research Unit of the Department of Finance, and at that time shall be repealed.

§ 17205. Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

§ 17206. Civil Penalty for Violation of Chapter

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city, or city and county, having a population in excess of 750,000, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, or, with the consent of the district attorney, by a city attorney in any city and county, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of

time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the General Fund. If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. Except as provided in subdivision (e), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered. The aforementioned funds shall be for the exclusive use by the Attorney General, the district attorney, the county counsel, and the city attorney for the enforcement of consumer protection laws.

(d) The Unfair Competition Law Fund is hereby created as a special account within the General Fund in the State Treasury. The portion of penalties that is payable to the General Fund or to the Treasurer recovered by the Attorney General from an action or settlement of a claim made by the Attorney General pursuant to this chapter or Chapter 1 (commencing with Section 17500) of Part 3 shall be deposited into this fund. Moneys in this fund, upon appropriation by the Legislature, shall be used by the Attorney General to support investigations and prosecutions of California's consumer protection laws, including implementation of judgments obtained from such prosecutions or investigations and other activities which are in furtherance of this chapter or Chapter 1 (commencing with Section 17500) of Part 3.

(e) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of any reasonable expenses incurred by the board shall be paid to the Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the Treasurer. The amount of any reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds the local agency.

(f) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered for the exclusive use by the city attorney for the enforcement of consumer protection laws. However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises that were the subject of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

§ 17206.1. (a) In addition to any liability for a civil penalty pursuant to Section 17206, any person who violates this chapter, and the act or acts of unfair competition are perpetrated against one or more senior citizens or disabled persons, may be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which may be assessed and recovered in a civil action as prescribed in Section 17206.

Subject to subdivision (d), any civil penalty shall be paid as prescribed by subdivisions (b) and (c) of Section 17206.

(b) As used in this section, the following terms have the following meanings:

(1) "Senior citizen" means a person who is 65 years of age or older.

(2) "Disabled person" means any person who has a physical or mental impairment which substantially limits one or more major life activities.

(A) As used in this subdivision, "physical or mental impairment" means any of the following:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one or more of the following body systems: neurological; muscoloskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine.

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness.

(B) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(c) In determining whether to impose a civil penalty pursuant to subdivision (a) and the amount thereof, the court shall consider, in addition to any other appropriate factors, the extent to which one or more of the following factors are present:

(1) Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons.

(2) Whether the defendant's conduct caused one or more senior citizens or disabled persons to suffer: loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person.

(3) Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.

(d) Any court of competent jurisdiction hearing an action pursuant to this section may make orders and judgments as may be necessary to restore to any senior citizen or disabled person any money or property, real or personal, which may have been acquired by means of a violation of this chapter. Restitution ordered pursuant to this subdivision shall be given priority over recovery of any civil penalty designated by the court as imposed pursuant to subdivision (a), but shall not be given priority over any civil penalty imposed pursuant to subdivision (a) of Section 17206. If the court determines that full restitution cannot be made to those senior citizens or disabled persons, either at the time of judgment or by a future date determined by the court, then restitution under this subdivision shall be made on a pro rata basis depending on the amount of loss.'

§ 17206.5. In addition to the persons authorized to bring an action pursuant to Section 17206, the City Attorney of the City of San Jose, with the annual consent of the Santa Clara County District Attorney, is authorized to prosecute those actions.

This section shall remain in effect until such time as the population of the City of San Jose exceeds 750,000, as determined by the Population Research Unit of the Department of Finance, and at that time shall be repealed.

§ 17207. (a) Any person who intentionally violates any injunction prohibiting unfair competition issued pursuant to Section 17203 shall be liable for a civil penalty not to exceed six thousand dollars ($6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of that conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of that conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant.

(b) The civil penalty prescribed by this section shall be assessed and recovered in a civil action brought in any county in which the violation occurs or where the injunction was issued in the name of the people of the State of California by the Attorney General or by any district attorney, any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney in any court of competent jurisdiction within his or her jurisdiction without regard to the county from which the original injunction was issued. An action brought pursuant to this section to recover civil penalties shall take precedence over all civil matters on the calendar of the court except those matters

to which equal precedence on the calendar is granted by law.

(c) If such an action is brought by the Attorney General, one-half of the penalty collected pursuant to this section shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment is entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county in which the judgment was entered and one-half to the city, except that if the action was brought by a city attorney of a city and county the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment is entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of the reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the State Treasurer. The amount of the reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the local agency.

§ 17208. Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

§ 17209. If a violation of this chapter is alleged or the application or construction of this chapter is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate division of a superior court, each person filing any brief or petition with the court in that proceeding shall serve, within three days of filing with the court, a copy of that brief or petition on the Attorney General, directed to the attention of the Consumer Law Section at a service address designated on the Attorney General's official Web site for service of papers under this section or, if no service address is designated, at the Attorney General's office in San Francisco, California, and on the district attorney of the county in which the lower court action or proceeding was originally filed. Upon the Attorney General's or district attorney's request, each person who has filed any other document, including all or a portion of the appellate record, with the court in addition to a brief or petition shall provide a copy of that document without charge to the Attorney General or the district attorney within five days of the request. The time for service may be extended by the Chief Justice or presiding justice or judge for good cause shown. No judgment or relief, temporary or permanent, shall be granted or opinion issued until proof of service of the brief or petition on the Attorney General and district attorney is filed with the court.

§ 17210. (a) For purposes of this section, "hotel" means any hotel, motel, bed and breakfast inn, or other similar transient lodging establishment, but it does not include any residential hotel as defined in Section 50519 of the Health and Safety Code. "Innkeeper" means the owner or operator of a hotel, or the duly authorized agent or employee of the owner or operator.

(b) For purposes of this section, "handbill" means, and is specifically limited to, any tangible commercial solicitation to guests of the hotel urging that they patronize any commercial enterprise.

(c) Every person (hereinafter "distributor") engages in unfair competition for purposes of this chapter who deposits, places, throws, scatters, casts, or otherwise distributes any handbill to any individual guest rooms in any hotel, including, but not limited to, placing, throwing, leaving, or attaching any handbill adjacent to, upon, or underneath any guest room door, doorknob, or guest room entryway, where either the innkeeper has expressed objection to handbill distribution, either orally to the distributor or by the posting of a sign or other notice in a conspicuous place within the lobby area and at all points of access from the exterior of the premises to guest room areas indicating that handbill distribution is prohibited, or the distributor has received written notice pursuant to subdivision (e) that the innkeeper has expressed objection to the distribution of handbills to guest rooms in the hotel.

(d) Every person (hereinafter "contractor") engages in unfair competition for purposes of this chapter who causes or directs any other person, firm, business, or entity to distribute, or cause the distribution of, any handbill to any individual guest rooms in any hotel in violation of subdivision (c) of this section, if the contractor has received written notice from the innkeeper objecting to the distribution of handbills to individual guest rooms in the hotel.

(e) Every contractor who causes or directs any distributor to distribute, or cause the distribution of, any handbills to any individual guest rooms in any hotel, if the contractor has received written notice from the innkeeper or from any other contractor or intermediary pursuant to this subdivision, objecting to the distribution of handbills to individual guest rooms in the hotel has failed to provide a written copy of that notice to each distributor prior to the commencement of distribution of handbills by the distributor or by any person hired or retained by the distributor for that purpose, or, within 24 hours following the receipt of the notice by the contractor if received after the commencement of distribution, and has failed to instruct and demand any distributor to not distribute, or to cease

the distribution of, the handbills to individual guest rooms in any hotel for which such a notice has been received is in violation of this section.

(f) Any written notice given, or caused to be given, by the innkeeper pursuant to or required by any provision of this section shall be deemed to be in full force and effect until such time as the notice is revoked in writing.

(g) Nothing in this section shall be deemed to prohibit the distribution of a handbill to guest rooms in any hotel where the distribution has been requested or approved in writing by the innkeeper, or to any individual guest room when the occupant thereof has affirmatively requested or approved the distribution of the handbill during the duration of the guest's occupancy.

(2)

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

AT&T INC., fka SBC COMMUNICATIONS INC.,

Petitioner,

v.

RLH INDUSTRIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court lacks jurisdiction to review the interlocutory decision of the California Court of Appeal in this case.

2. Whether application of California's Competition statutes to out-of-state anticompetitive conduct that substantially affects California commerce is either beyond the reach of the Commerce Clause or subject to the *Pike* balancing analysis.

RULE 29.6 STATEMENT

Respondent RLH Industries, Inc., a California corporation, does not have a parent company and no other public company owns 10% or more of its stock.

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JURISDICTION

This Court lacks jurisdiction to review the interlocutory order of the California Court of Appeal in this case. The California Court of Appeal rendered an "interim" decision; not a final judgment. After the Supreme Court of California denied review, the case was remanded to the trial court. Trial is set for January 8, 2007.

Under 28 U.S.C. § 1257(a), this Court's review of state court decisions is confined to "final judgments or decrees rendered by the highest court of a State in which a decision could be had." To warrant review by this Court, a case must be subject to no further review or correction in any other state tribunal and must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997).

The decision of the court below was not an effective determination of the litigation. First, petitioner AT&T Inc. ("AT&T") may yet establish that the Commerce Clause bars the antitrust and unfair competition claims of respondent RLH Industries, Inc. ("RLH"); and this showing may, indeed, be bound together with RLH's proofs of the effects of AT&T's conduct in California. Secondly, AT&T undoubtedly will raise other federal issues including due process of law. Third, not all of RLH's claims involve federal issues. Fourth, the trial court's decision will be subject to further review by the California appellate courts and also by this Court.

Moreover, the decision below does not fall within any of the four categories of exceptional cases in which the Court has treated state-court judgments as final even though further

proceedings were to take place in state court. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-485 (1975). The first three *Cox* categories are plainly inapplicable. The fourth *Cox* category, too, is inapplicable. Delaying review of the decision below cannot "seriously erode . . . Constitutional policy" as no immediate and systemic consequences will result from such a delay.

COUNTERSTATEMENT OF THE CASE

RLH, a California company, is one of only four manufacturers of high voltage protection ("HVP") devices used to prevent life and property threatening electrical surges. P.A. 4.[1] The California Court of Appeal, reversing summary judgment in favor of AT&T, determined that "triable issues abound" on whether AT&T's policy of forbidding its customers from buying or installing their own high voltage protection ("HVP") devices from RLH or anyone else, in AT&T's five state Midwestern territory where it dominates local telephone service, is a tying arrangement. P.A. 19a-20a. The court below also found evidence tending to show that this conduct injured RLH ("Cynergy Corporation would prefer to use RLH devices in its new facilities, but instead leases [AT&T] HVP services due to its HVP policy"). P.A. 20a. In recent years, RLH lost thousands of dollars in sales to AT&T at Cynergy alone. Appellant's Opening Brief, pg. 36.

AT&T, until recently known as SBC Communications Corp., conceded personal jurisdiction in California.[2] P.A. 18a.

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1. The Appendix to the Petition for Certiorari is cited as "P.A. [*page*]."

2. SBC asserts that the court erroneously found personal jurisdiction over it. But the record clearly shows that SBC not only

(Cont'd)

RLH brought its second amended complaint against AT&T in California state court consisting of four causes of action, the first and second for unlawful tying arrangements in violation of California's Cartwright Antitrust Act, *Cal. Bus. & Prof. Code*, §§ 16720, 16726 *et seq.*, the third under California's Unfair Competition Act, *Cal. Bus. & Prof. Code*, §§ 17200 *et seq.*, and the fourth for common law intentional interference with prospective advantage. The third and fourth causes of action are based primarily, but not entirely, on the tying arrangements. P.A. 25a-42a. Although AT&T glosses over it [Cert. Pet., pp. 4, 11, 21], only the unfair competition cause of action seeks affirmative injunctive relief. P.A. 38a, 40a (Prayer for Relief).

AT&T incorrectly asserts that RLH's second amended complaint did not allege claims against AT&T's out-of-state subsidiaries based on RLH's efforts to sell its products in California. Cert. Pet., pg. 4. This statement creates the misconception that RLH does not manufacture and sell its HVP devices in California. To the contrary, as AT&T acknowledges, RLH has its headquarters and principal place of business in California; it manufactures and sells its HVP devices there. P.A. 26a, ¶ 4. So, RLH's claims are, in fact, based on its efforts to sell HVP devices in California.

(Cont'd)

conceded the Court's personal jurisdiction over SBC but also the Court's power to award damages or injunctive relief as to extraterritorial conduct that impacts California, as follows: "[w]e don't dispute at all that we are properly here and that this court has the power to issue an award . . . of damages or injunctive relief with respect to conduct that impacts the state of California" and, moments later, "[t]his is not about jurisdiction. We'll concede jurisdiction." Appellant's Reply Brief, p. 14 (*citing* August 26, 2003 Hearing Transcript, pp. 7:18-24, 13:22-24)

AT&T also claims that RLH's pleading does not allege that AT&T's out-of-state tying arrangements impacted the California market for HVP devices or California consumers of HVP devices. Cert. Pet., pg. 4. AT&T's statement again creates the misconception that AT&T's allegedly unlawful conduct is disconnected from California. AT&T not only fails to acknowledge that its conduct has caused injury to California commerce but also ignores RLH's allegation that California was the locus of part of the allegedly wrongful conduct. P.A. 32a, ¶ 24.

Further, AT&T asserts that every state in which it operates has its own regulatory body and tariffs and some of these tariffs embody the conduct comprising the alleged tying arrangements. Cert. Pet., pg. 5-6. AT&T, however, has overlooked relevant fact-intensive questions: whether these tariffs are proper subjects of regulation that are mandated by state law and closely supervised or are, as the evidence would suggest, unilaterally written and imposed by AT&T. Appellant's Reply Brief, pp. 24-25; P.A. 19a. These questions can only be answered through trial on the merits.

In response to a summary judgment motion in California, the nonmovant must demonstrate (i) that the movant failed to produce admissible evidence showing that an element of the cause of action cannot be established or (ii) if necessary, the existence of a triable issue of material fact as to the element at issue. *Certain Underwriters at Lloyd's of London v. Superior Court*, 24 Cal. 4th 945, 103 Cal. Rptr. 2d 672 (2001). Thus, while RLH produced sufficient evidence to defeat AT&T's summary judgment motion, RLH did not have to show, for example, the full extent of its injuries attributable to AT&T's allegedly anticompetitive conduct or the total effect of AT&T's out-of-state conduct upon California

commerce. Again, development of a complete factual record on this issue must await trial.[3]

The California Court of Appeal also denied summary judgment to AT&T on its contention that it was not liable for its subsidiaries' HVP policies, holding that "[w]hether AT&T is liable under either an agency or alter ego theory is a question of fact." As the court below found, this is a fact-laden question. P.A. 11a. It is inextricably intertwined with the merits of the case. Accordingly, determination of this issue, too, awaits trial.

Finally, in finding that AT&T "failed to meet its summary judgment burden" on the Commerce Clause defense (P.A. 18a),[4] the court below allowed AT&T the opportunity to establish in the trial court that the Commerce Clause, in fact, bars RLH's state antitrust and unfair competition claims. P.A. 19a. The court explained that whether the state law unduly burdens interstate commerce when all is taken into account requires an analysis which AT&T did not present on summary judgment: a "fact intensive" balancing of the "benefits of applying California law to [AT&T's] alleged tying arrangements against the burden condemning the tying arrangements under California law . . . would impose on interstate commerce (*citing Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970))." P.A. 15a.

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3. At trial RLH expects to show the full extent of the harm to RLH's production, sales and earnings in California resulting from AT&T's alleged conduct and, beyond that, the "ripple" effects of AT&T's conduct upon, among other things, salaries and employment of California residents, purchases from California suppliers and the like.

4. The specific statutes which AT&T contends are barred by the Commerce Clause are the Cartwright Act and the Unfair Competition Act. Brief for Respondents, p. 30.

The California Court of Appeal found that AT&T not only came up short on its Commerce Clause analysis but also neglected to raise and, therefore, waived for summary judgment purposes other potentially relevant issues including legislative intent, due process of law and conflict of laws ("[t]he conflict of laws or due process issues may . . . require an in-depth analysis of the legal effect of the tariffs that AT&T has filed with various state agencies"). P.A. 18a-19a. Accordingly, the California Court of Appeal remanded the case for trial, "express[ing] no opinion on potentially relevant issues not yet litigated, including a rigorous *Pike* analysis." P.A. 19a. Reflecting the "interim" nature of the proceedings, the court granted the trial court discretion to award appeal costs to "the party ultimately prevailing." P.A. 21a.

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction to Review The Interlocutory Order of The California Court of Appeal.

Palpably, this Court lacks jurisdiction to review the interlocutory order of the California Court of Appeal in this case. This Court's review of state court decisions is confined to "final judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). From the face of the California Court of Appeal's decision, it is readily apparent that, in the court's own words, it is an "interim proceeding"; the court did not render a "final judgment." The court referred specifically to AT&T's failure to meet its summary judgment burden and "express[ed] no opinion on potentially relevant issues not yet litigated, including a rigorous *Pike* analysis."

There are indeed further proceedings yet to come in the case. The trier-of-fact has not heard RLH's antitrust and unfair competition claims or AT&T's state and federal defenses including that (i) AT&T is not liable for the acts of its local telephone subsidiaries (ii) the tying claims are barred by the Commerce Clause and (iii) the tying claims are barred by other Constitutional infirmities such as due process of law. Apart from that, the trier-of-fact has yet to hear RLH's tortious interference with prospective advantage claim which is unaffected by federal issues.[5] After the trial court renders judgment on all of RLH's claims, either party may appeal as of right to the California Court of Appeal. That court's decision is in turn subject to discretionary review by the Supreme Court of California and by this Court.

The finality requirement "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (citation omitted). To warrant review by this Court, a case must be final in two senses: "'it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Id.* (citation omitted).

The Court has expressly held that the judgment "should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved." *Collins v. Miller*, 252 U.S. 364, 370 (1920). The decision below plainly does not meet this standard. To begin with,

5. AT&T did not argue whether RLH's intentional interference cause of action is barred by the Commerce Clause. Therefore, the Court of Appeal did not address this question.

the court below ruled that AT&T may yet establish that the Commerce Clause bars RLH's antitrust and unfair competition claims as a matter of fact. This showing may, indeed, be bound together with RLH's proofs on the merits, *i.e.* substantial impact upon California commerce.

Secondly, AT&T undoubtedly will raise due process of law and other federal issues. Third, some but not all of RLH's claims involve federal issues. RLH's tortious interference claim remains unaffected. Finally, the trial court's decision is subject to review by the California appellate courts. Even assuming the Court of Appeal adheres to its interim Commerce Clause ruling as "law of the case," that decision will not bind the California Supreme Court, should it grant discretionary review. And, the decision surely will not be binding upon this Court.

Nor does the decision below fall within any of the four categories of cases in which the Court has treated state-court judgments as final even though further proceedings were to take place in state court. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-485.[6] The first three *Cox* categories are

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6. *Cox* holds that the finality requirement may be satisfied despite the pendency of further proceedings when (1) "there are further proceedings * * * yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," (2) "the federal issue * * * will survive and require decision regardless of the outcome of future state-court proceedings," (3) "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," or (4) "the federal issue has been finally decided in the state courts with further proceedings

(Cont'd)

plainly inapplicable. The federal issue is not conclusive or preordained. Indeed, the California Court of Appeal identified potential Constitutional issues, *e.g.* due process, that AT&T has not yet raised. *See Cox*, 420 U.S. at 477 (exceptional situations typically "would not require the decision of other federal questions that might also require review by the Court at a later date").

The federal issues will not necessarily "survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. Should AT&T prevail on any of its state law defenses, the federal issues could be mooted. *Jefferson*, 522 U.S. at 82. On the other hand, if AT&T does not prevail, it may appeal all issues as of right to the California Court of Appeal followed by discretionary review in the California Supreme Court. Thus, the California courts' ultimate "determination will in no way limit [this Court's] ability to review the issue on final judgment." *Jefferson*, 522 U.S. at 82-83.

The fourth *Cox* category involves cases in which

> the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, * * * and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action.

This category is also inapplicable.

(Cont'd)

pending in which the party seeking review here might prevail on the merits on nonfederal grounds, * * * and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." 420 U.S. at 479-483.

Although AT&T could arguably prevail on the merits on nonfederal grounds *and* prevail on federal grounds on the antitrust and unfair competition claims if this Court reversed the lower court's Commerce Clause ruling, the fourth *Cox* exception is only available when delaying review would "seriously erode . . . Constitutional policy." *Cox*, 420 U.S. at 483. In the Constitutional realm, the fourth *Cox* exception has been limited, as a rule, to First Amendment cases, *id.* at 484-85 (citing cases), and, as a rare exception, to other Constitutional issues in which the impact of delaying review has immediate and potentially systemic consequences. *E.g. Mazurek v. Armstrong*, 520 U.S. 968 (1997).

Delaying review would not seriously erode Constitutional policy in the circumstances of this case. The question raised by AT&T does not raise First Amendment questions. Nor does it have imminent and potentially systemic consequences. It is, therefore, comparable to such cases as *Flynt v. Ohio*, 451 U.S. 619, 622-23 (1981) (resolution of equal protection clause issue could await final judgment without "adverse effect upon important Federal interests; a contrary conclusion would permit the fourth exception to swallow the rule") and *Johnson v. California*, 541 U.S. 428, 430 (2004) ("no convincing claim of erosion of federal policy that is not common to all decisions rejecting a defendant's [Constitutional] claim").

Accordingly, the Court lacks jurisdiction to review the interlocutory decision of the California Court of Appeal in this case.

II. There is Not a Genuine Conflict in The Lower Courts on Whether Direct Regulation of Extraterritorial Commerce is Unconstitutional Without Further Inquiry

AT&T argues that the Court should grant certiorari because there is a division in the Circuits on whether direct regulation of extraterritorial commerce is unconstitutional without further inquiry. Cert. Pet., pg. 16. No genuine conflict exists. It is simply the case that no court has adopted AT&T's view that "regardless of the beneficial effects a statute has on local activity it should be declared invalid if it has any extraterritorial effects." *See Alliant Energy Corp. v. Bie*, 336 F.3d 545, 547 (7th Cir. 2003) (rejecting such an argument in denying petition for rehearing *en banc*). Rather, lower courts have applied this Court's precedents requiring courts to strike down "a state law shown to have extraterritorial scope and an *adverse impact* on commerce occurring wholly outside the state." *National Solid Wastes Management Association v. Meyer*, 63 F.3d 652, 659 (7th Cir. 1995) (emphasis added).

A. The Critical Inquiry in Commerce Clause Jurisprudence is Always The Same; The Scope and Depth of The Inquiry Vary Depending Upon The Nature of The Statute and The Facts of The Case.

In all cases addressing Commerce Clause questions, the critical inquiry remains the same: "[T]he overall effect of the statute on both local and interstate commerce." *Healy v. Beer Inst.*, 491 U.S. 324, 337 n.14 (1989) (*citing Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986)).[7] The scope and depth of the inquiry needed

7. The *Healy* Court also noted that its "distillation of principles from prior cases involving extraterritoriality [including the principle upon which AT&T relies] is meant as nothing more than a restatement of those specific concerns that have shaped *this* inquiry." *Healy v. Beer Inst.*, 491 U.S. at 337 n.14 (emphasis added).

to determine whether a state law unduly burdens interstate commerce and, therefore, transgresses the Commerce Clause vary depending upon the nature of the statute at issue and the facts of the particular case. AT&T's review of the lower court cases overlooks this important point. As a consequence, AT&T sees division and confusion that on closer scrutiny does not necessarily exist.

In *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003), as one example, the court reviewed a Vermont criminal statute intended to protect minors living in Vermont from internet obscenity. The court observed that the internet is a unique phenomenon that does not recognize geographic boundaries. *Id.* at 103. As a result, website operators operating lawfully in State A were subject to criminal penalties in Vermont. *Id.* While acknowledging Vermont's interest in protecting minors against such out-of-state websites (*id.* at 104), the court nevertheless found an undue burden on out-of-state commerce resulting from inconsistent state legislation in this sphere. *Id.* (*citing e.g. American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 182 (S.D.N.Y. 1997)).

Accordingly, in striking down state internet legislation, lower courts have relied upon analysis of its practical effects and found adverse impact upon interstate commerce. *Accord*: *Psinet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (adopting *Pataki* analysis regarding "haphazard, uncoordinated, and even out-right inconsistent regulation by states") and *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (also relying upon the *Pataki* analysis).

Similarly, in *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993), the court analyzed a Nevada statute providing certain due

process protections during enforcement proceedings that the NCAA, the national intercollegiate athletic regulatory organization, did not provide. The statute was apparently aimed exclusively at the NCAA, whose goal is to create a uniform nationwide collegiate athletic "product" through enforcement procedures applied uniformly and even-handedly nationwide. *Id.* at 638.

The court clearly found that Nevada's statute was per se invalid *because* it unduly burdened out-of-state commerce. Nevada's statute forced the NCAA either to adopt non-uniform standards which could lead to college athletic non-uniformity or, alternatively, to compromise the integrity of its product in every state by adopting Nevada's procedures nationwide. *Id.* at 639. Beyond that, other states also had enacted or were about to enact their own due process statutes, creating "the serious risk of inconsistent obligations . . ." *Id.* at 640.

In *National Solid Wastes Management Association v. Meyer*, 63 F.3d 652 (7th Cir. 1995), the court analyzed a Wisconsin statute that prohibited waste generators from using Wisconsin landfills unless they generated waste in a community that adopted the law's "effective recycling program." The court struck down the statute after finding an adverse impact on out-of-state commerce. The law worked a practical "embargo" on out-of-state communities that refused to comply with the Wisconsin law and had the practical effect of inflicting a higher cost burden on some out-of-state competitors than on others wholly based on whether their communities adhered or refused to adhere to Wisconsin's statute. *Id.* at 660-61.

B. The First and Eighth Circuits' "First Tier" Commerce Clause Analysis Does Not Conflict With That of Other Circuits.

Although AT&T argues otherwise [Cert. Pet. Pg. 18], the First and Eighth Circuits have not rejected the view that direct regulation of interstate commerce is per se invalid. Rather, these courts, too, have looked beyond the mere extraterritorial effect of the statute and have analyzed whether in "practical effect" it unduly burdens interstate commerce and, therefore, violates the Commerce Clause.

C. The First Circuit's Application of Commerce Clause Precedents Recently Has Been Approved by The Court.

The First Circuit's decision in *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66 (1st Cir. 2001), *aff'd sub nom. Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003), illustrates the proper application of Tier One analysis more adequately than *Grant's Dairy-Maine LLC v. Commissioner of Maine Dept. of Agriculture*, 232 F.3d 8 (1st Cir. 2000), and also carries the advantage of this Court's review and imprimatur of its Commerce Clause analysis. *Walsh*, 538 U.S. at 669-70 ("Maine Act does not regulate the price of any out-of-state transaction" and the "Program will not impose a disparate burden on any competitors.")

In *Concannon*, the court reviewed a Maine statute intended to obtain lower prescription drug prices for Maine's citizens. The program subsidized drug prices by collecting rebate payments from participating drug manufacturers. The primary incentive for manufacturers to enter rebate agreements with the state was a rule that drugs of all

noncompliant manufacturers could lose their Medicaid authorization. *Concannon*, 249 F.3d at 71-72.

The court rejected an argument that the law constituted per se invalid extraterritorial regulation as it necessarily regulated drug manufacturer and distributor transactions outside the borders of Maine and reduced rmanufacturers' profits. *Id.* at 80, 82. Because Maine did not insist that manufacturers sell their drugs to a wholesaler for a certain price nor tie the price of its in-state products to out-of-state prices, it was not regulating their out-of-state conduct. *Id.* at 81-82. Rather, the Act simply regulated in-state activity. *Id.* at 82. Moreover, it did not appear that adverse effects on commerce would occur if similar legislation were enacted in other states. *Id.* at 82-83.

D. The Eighth Circuit's Approach to Commerce Clause Analysis is Not Out-of-Line With its Sister Circuits.

Finally, AT&T has cited *Southern Union Co. v. Missouri Public Service Commission*, 289 F.3d 503 (8th Cir. 2002), as evidence that the Eighth Circuit has rejected the principle that direct regulation of interstate commerce is *per se* invalid. The Eighth Circuit, however, has not rejected that principle. Instead, like her sister Circuits and this Court, the Eighth Circuit has analyzed whether the law has "extraterritorial scope and an adverse impact on commerce occurring wholly outside the state." *See Meyer, supra*, 63 F.3d 652, 659.

Cotto Waxo Co. v. Williams, 46 F.3d 790 (8th Cir. 1995), applied this type of analysis to a Minnesota law prohibiting the sale of petroleum-based sweeping compounds. As a result of the law's passage, Minnesota wholesalers and distributors

refused to purchase or sell these petroleum-based sweeping compounds from the plaintiff who lost not only its Minnesota customers but also most of its sales in surrounding states. *Id.* at 793-94.

Mindful that a statute could have *per se* unconstitutional extraterritorial reach under this Court's precedents "when it necessarily requires out-of-state commerce to be conducted according to in-state terms," the court did not find that to be the case. Although the law "affected [the plaintiff's] participation in interstate commerce," it did not "necessarily affect out-of-state commerce" — the plaintiff was still "able to sell to out-of-state purchasers regardless of [its] relationship to Minnesota." *Id.* at 794. Therefore, the court ruled out per se invalidity and applied the balancing analysis approved in *Pike, supra,* 397 U.S. 137, 142. *Accord*: *Hampton Feedlot v. Nixon*, 249 F.3d 814, 818 (8th Cir. 2001) (determining that state statute was not per se invalid direct regulation of or discrimination against interstate commerce).

Cotto Waxo underscores that, though the scope and depth of the inquiry needed to determine whether a state law unduly burdens interstate commerce may vary depending upon the nature of the statute at issue and the facts of the particular case, there is no *genuine* conflict among the Circuits regarding proper application of the Court's Commerce Clause precedents.

III. The California Court of Appeal's Decision Correctly Applied This Court's Commerce Clause Precedents.

The California Court of Appeal's analysis of AT&T's Commerce Clause argument is incorporated herein by reference. PA 11a-19a. Contrary to the argument advanced by AT&T [Cert. Pet., p. 12], the court below correctly applied the first tier of this Court's two-tier Commerce Clause analysis[8], insofar as the summary judgment record would permit.

A. The California Court of Appeal Applied the First Tier Commerce Clause Analysis Insofar as The Record Permitted.

In determining whether a statute unreasonably burdens interstate commerce, the Court repeatedly has deemed it appropriate to consider how a statute such as California's Cartwright Act operates in the context of other states' laws. *E.g., Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) (applying "internal consistency" test and inquiring

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8. The two-tier analysis reads as follows:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. at 579.

whether "imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear").

The California Court of Appeal properly applied the "internal consistency" test and found no inconsistency.[9] Observing that *Healy's* "understanding of the commerce clause's purpose and scope may be consistent with giving extraterritorial effect to [state antitrust] laws," the court determined that projecting California's prohibition of tying arrangements into other states would not create internal inconsistency as "the Sherman Act already bars tying arrangements throughout the land." P.A. 14a.[10]

Implicit in the California Court of Appeal's Commerce Clause analysis is the recognition that, unlike the statutes in cases such as *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), where extraterritorial transactions were regulated in some instances for no reason while providing no protection for any legitimate state interest, application of the California statutes in this case never affects extraterritorial conduct

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9. The court below pointedly observed that AT&T "notes no inconsistency" between condemnation of the tying arrangements under California or federal law. P.A. 15a.

10. Additionally, practically every state has enacted "little Sherman" statutes which are generally governed or guided by federal antitrust precedents. This Court has recognized in connection with the settlement of a case brought by various states challenging an extraterritorial price fixing conspiracy under both state and federal antitrust laws that the former are not preempted by federal antitrust laws and, indeed, are "consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct." *See California v. ARC America Corp.* 490 U.S. 93, 101-102 (1989).

without providing corresponding protection for California's significant interests. *See CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987). Thus, the California Court of Appeal reasoned — without finally deciding the issue — that California's antitrust and unfair competition statutes could reach out-of-state anticompetitive practices that *cause harm in California.*

B. The California Court's Understanding of Commerce Clause Jurisprudence Finds Support in Decisions From Other Jurisdictions That Have Applied State Antitrust Statutes to Out-of-State Anticompetitive Conduct.

The California Court of Appeal's understanding of the Court's Commerce Clause jurisprudence also finds support in decisions from other jurisdictions that have applied state antitrust statutes to out-of-state anticompetitive conduct causing in-state harm, and also in authoritative commentary. P.A. 16a-18a (*citing In re Lorazepam & Clorazepate Antitrust Litigation*, 295 F. Supp. 2d 30 (D.D.C. 2003); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 993-994 (9th Cir. 2000); and *Heath Consultants v. Precision Instruments*, 527 N.W.2d 596 (Neb. 1995); Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 Ind. L.J. 375, 376(1983).[11]

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11. The Court's approach in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572-73 (1996) also offers support. The Court found that the punitive damages award under Alabama's statute could violate *Healy*'s state sovereignty and comity principles only if (a) the conduct "had no impact on Alabama or its residents" or (b) Alabama's intent was to punish the defendant or to deter its lawful conduct in other states rather than to protect Alabama's own consumers and economy from harm.

Significantly, leading antitrust decisions from other jurisdictions disagree with AT&T's contention that application of a state's antitrust statute to out-of-state anticompetitive conduct is *per se* invalid direct regulation of interstate commerce. Cert. Pet., p. 11, *et seq.* These decisions regard the state's antitrust statute as having "incidental effects" on interstate commerce subject to the *Pike* balancing analysis[12] — an analysis the court below found appropriate for the present case but declined to undertake for AT&T. P.A. 16a-17a.[13]

C. AT&T's Contention That The Commerce Clause Bars All Claims Under State Statutes Based Upon Extraterritorial Conduct is Overly Simplistic and Unavailing.

AT&T persists in maintaining — somewhat awkwardly as will be shown in the next section — that the Commerce Clause bars all claims under state statutes based upon extraterritorial conduct (even when the conduct has in-state

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12. *Heath Consultants* and *Lorazepam Antitrust Litigation*, *supra*, cited by the court below, reached this conclusion. Other decisions that were not cited by the court also have determined that the state antitrust statute in question had "incidental effects" on interstate commerce and, therefore, employed or would employ the *Pike* balancing analysis in determining whether such statutes can be applied to out-of-state anticompetitive conduct harmful to state interests. *See, e.g., Freeman Industries, LLC v. Eastman Chem. Co.*, 172 S.W. 3d 512 (Tenn. 2005); *Olstad v. Microsoft Corp.*, 700 N.W. 2d 139 (2005); *C. Bennett Bldg. Supplies v. Jenn Air*, 759 S.W. 2d 883 (Mo. App. 1988); *State v. Coca Cola Bottling Co. of Southwest*, 697 S.W. 2d 677 (Tex. App. 1985).

13. The court noted that "[e]ven if we wanted to conduct a *Pike* balancing analysis for [AT&T], the record [AT&T] developed for summary judgment would not allow us to do so at this time." P.A. 16a n.5.

effects). Cert. Pet., pp. 12-13. AT&T's overly simplistic argument is flawed. This Court "has never suggested that the dormant Commerce Clause requires Balkanization, with each state's law stopping at the border." *Instructional Sys. v. Computer Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994) (*citing* Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1878 (1987) ("prohibition [of all state laws that have substantial extraterritorial effects] would invalidate much too much legislation.")).

That AT&T's overly simplistic argument is at odds with this Court's Commerce Clause jurisprudence is also suggested by the recent denial of a writ of certiorari to Beretta, U.S.A., Corp. (joined by the Chamber of Commerce of the United States, among others, as *amici curiae*), whose argument to the Court was strikingly similar to that of AT&T.[14] *Beretta, U.S.A., Corp. v. District of Columbia*, __ U.S. __; 126 S. Ct. 399; 163 L. Ed. 2d 277 (2005).

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14. Beretta sought review of *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633 (D.C. 2005) (en banc), which rejected a contention that the Commerce Clause, *inter alia*, barred application of a District of Columbia statute holding out-of-state weapons manufacturers strictly liable in tort for injuries arising from the discharge of certain weapons in the District of Columbia.

D. AT&T's Attempt to Draw a Commerce Clause Distinction Between In-State Impact on Consumers or Markets, on One Side, And Manufacturers And Vendors, on The Other, is a Distinction Without a Difference.

While, on the one hand, AT&T contends that the Commerce Clause bars all claims under state statutes based upon extraterritorial conduct (even when the conduct has in-state effects), on the other, the Petitioner strongly implies that a nexus between out-of-state anticompetitive conduct and in-state impact upon *consumers or markets* would withstand Commerce Clause scrutiny. As just one example, and there are others, AT&T states that "no benefits on the side of regulation can justify California in controlling [out-of-state] conduct . . . that does not impact California markets or consumers."[15] Cert. Pet., pp. 13, 23. While in-state competitive injury to consumers or markets would withstand such scrutiny, such injury to California *manufacturers or vendors* of goods; that is, RLH, would not.

AT&T has merely created a distinction without a difference in either law or economics. Commerce, by definition, is "the exchange of goods and services, esp. on a large scale involving transportation between cities, states and nations." *Black's Law Dictionary* (7th Ed. 1999). In seeking to limit its definition of commerce to consumers or markets, AT&T is perforce excluding manufacturers and vendors, one-half of the commerce equation. AT&T's "distinction" of

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15. AT&T effectively concedes this point in its Question Presented: "Whether a State's direct regulation of commercial [out-of-state] conduct . . . that has no effect on *consumers or markets* within that State is a per se violation . . ." (emphasis added).

convenience is out-of-touch not only with economic and business reality but also with the sound objectives of antitrust law.

Antitrust laws generally and California's Cartwright Act, in particular, outlaw combinations to "prevent competition in manufacturing . . . transportation . . . [or] sale . . . of merchandise." *See Cal. Bus. & Prof. Code* § 16720 (c). In Commerce Clause challenges to state antitrust law enforcement, courts have never recognized any distinction based on which side of the commerce equation the victim falls. *See, e.g., Knevelbaard Dairies v. Kraft Foods, Inc., supra,* 232 F.3d at 993-994 (milk producers adversely affected by out-of-state conspiracy) and *Lorazepam Antitrust Litigation, supra.* (Illinois insurance company responsible for paying its out-of-state subscribers' price-fixed prescription drug costs).

AT&T's citation to *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), as support for its strained distinction, is far off the mark. Indeed, the Court noted in *Matsushita* that the Sherman Act reaches conduct outside United States borders "when the conduct has an effect on American commerce." *Id.* at 582 n.6. The *Matsushita* language recited by AT&T simply pertains to conduct in Japan having no impact on American commerce. *Id.* at 583.[16] That language is manifestly inapposite to the present case. The court below found that RLH demonstrated sufficient injury attributable to AT&T's out-of-state tying arrangements to meet its summary judgment burden. P.A. 20a.

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16. In *Matsushita*, the Court found that, although a below-cost (predatory) pricing conspiracy by Japanese television producers could have injured the plaintiff manufacturers, they were unable to establish such a conspiracy. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986).

If AT&T were to concede, as it should, that there is no legitimate distinction in this context between consumers, manufacturers and vendors, it would be left with the argument that the nexus between AT&T's out-of-state anticompetitive conduct and RLH's in-state injury could withstand Commerce Clause scrutiny under other circumstances but does not on the facts of this case because the commerce is *quantitatively* insufficient.

Such an argument, of course, presents a paradigm fact question that is entirely inappropriate for review on an incomplete summary judgment record. *See* n.3, *supra*. But wholly apart from it being a paradigm fact issue, it is not the proper analysis of substantiality in any event. *See Freeman Industries, LLC v. Eastman Chem. Co.*, 172 S.W. 3d 512, 523-24 (Tenn. 2005) (under federal antitrust precedents, whether effect is substantial does not involve "mathematical nicety"; "test is pragmatic, turning on facts . . ."; "anticompetitive conduct need not threaten demise of [state's] business").

E. AT&T's Tariff Argument Presents Fact Questions That Are Not Ripe For Review.

Finally, AT&T argues that RLH "seeks to use California law to make AT&T's subsidiaries change their filed tariffs" in other states. Cert. Pet., pg. 15. The California Court of Appeal refused to entertain this argument on its merits because AT&T "mentioned the tariff issue only in a footnote with a single citation to *Healy*, and thus failed to offer the comprehensive legal analysis needed to affirm summary judgment on this ground (citations omitted)." P.A. 19a. The court, however, added that this was one of the "potentially relevant issues" that could be litigated after the case was remanded to the trial court. P.A. 18a-19a.

AT&T's tariff argument is not yet ripe for review by this Court for the reasons stated by the court below, among others. First, RLH seeks affirmative injunctive relief *only* under the California Unfair Competition statute, not under the Cartwright Act. Secondly, injunctive relief has not been granted in this case so there has been no judgment requiring AT&T to modify its conduct and, therefore, no review of such relief by California's appellate court system. Most importantly, and finally, the factual record has not been sufficiently developed to determine whether the tariffs embodying the HVP tying arrangements at issue are immune from antitrust scrutiny. *See* P.A. 19a (*citing Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F. 2d 716, 733-37 (9th Cir. 1981)).

IV. This is The Wrong Case at The Wrong Time For Further Review and Application of Commerce Clause Principles.

The California Competition statutes reviewed in the court below apply only to anticompetitive conduct having substantial effects on California commerce. AT&T's speculation concerning other states following the lead of the California Court of Appeal in this case, risks of inconsistent legislation, and interstate economic battles, can readily be put to rest.

All companies transacting business in the United States must comply with federal antitrust laws. Federal antitrust laws proscribe certain unlawful tying arrangements. The same tying arrangements fall within the purview of the antitrust laws of California and other states based on federal antitrust precedents. This Court unanimously has determined that state antitrust laws are "consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and

ensuring the compensation of victims of that conduct." *See California v. ARC America Corp.* 490 U.S. 93, 101-102 (1989). If any state were to enact antitrust legislation that "actually conflicts" with federal antitrust law, the legislation would be subject to federal preemption. *Id.* at 100-101.

Nothing in the record reviewed by the California Court of Appeal would suggest that AT&T or any other company is required by California's Competition statutes to do anything beyond complying with federal antitrust law. Each and all are able to sell their products and services and compete on equal terms throughout the Union, and that has remained the case, not despite, but rather because of state (and federal) antitrust enforcement of out-of-state anticompetitive conduct on behalf of its citizens over many, many years.

Anticompetitive conduct imposes a significant burden on commerce. Thus, the chief concerns of state antitrust law enforcement and the Commerce Clause are complementary: both protect against actions "with the aim and effect of establishing an economic barrier against competition . . . ," the former through the use of private anticompetitive conduct and the latter through the use of state authority. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935); *see, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

So, for reasons going beyond the palpable absence of jurisdiction under 28 U.S.C. § 1257(a), this antitrust case — which challenges the Petitioner's alleged anticompetitive conduct under state laws intended to protect and maintain the flow of commerce — is not certworthy. It is simply the wrong case at the wrong time for a further review and application of this Court's Commerce Clause principles, one that could have far reaching and uncharted consequences for the rapidly changing face of American business.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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No. 05-1493

IN THE
Supreme Court of the United States

AT&T INC. (F/K/A SBC COMMUNICATIONS INC.),
Petitioner,

v.

RLH INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Statement pursuant to Rule 29.6 was set forth at page iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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The lower court in this case held that, under the Commerce Clause, there is no *per se* bar on States directly regulating commerce occurring wholly outside their borders. That decision conflicts with the controlling decisions of this Court, as well as the law in several federal courts of appeals. It does, however, accord with the law in the First and Eighth Circuits. This Court's intervention is necessary to resolve the conflict among the lower courts as to a fundamental and recurring constitutional issue.

Respondent RLH Industries, Inc. ("RLH") offers no convincing defense of the California court's decision and, despite its efforts to sow confusion, cannot obscure the clear split between the circuits or the purely legal character of the question presented. RLH's only argument against the Court's exercise of jurisdiction is that leaving the decision below in place would not seriously erode federal policy. That argument fails under this Court's precedents. Denial of review would allow California, at the behest of any of its residents, to control commerce occurring wholly outside its borders and, in so doing, trump the law of the other States where the commerce is occurring. Such extraterritorial regulation threatens not only the free flow of interstate commerce, but also the basic premises of our constitutional structure. The decision at issue here thus imperils federal policy in a much more fundamental and broadly applicable way than the many state-court preemption decisions over which this Court has previously exercised jurisdiction under the same doctrine that RLH concedes is controlling here.

I. The Court Has Jurisdiction To Review The Decision Below

Section 1257(a) authorizes this Court's review of any "[f]inal judgment[] or decree[] rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court explained that "the requirement of finality is to be given a practical rather than a technical construction." *Id.* at 478 n.7 (internal quotation

marks omitted). *Cox* recognized "at least four categories of . . . cases" in which the Court had jurisdiction to review a state-court decision on a federal issue "without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* at 477.[1] The fourth such category consists of cases where: (1) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court"; (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"; and (3) "a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 482-83.

Under this Court's prior decisions, this case falls squarely within the fourth *Cox* category. It is undisputed that the federal issue – whether direct extraterritorial regulation is *per se* invalid under the Commerce Clause – "has been finally decided in the state courts," with the California Court of Appeal resolving the issue against AT&T, and the California Supreme Court denying review. It is further undisputed that, if the Court does not grant review now, AT&T "might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court." *See* Opp. 9 (conceding that, "[s]hould AT&T prevail on any of its state law defenses, the federal issues could be mooted"). Finally, it is undisputed that reversal of the California court on the federal issue "would be preclusive of any further litigation" on RLH's causes of action against AT&T's out-of-state subsidiaries. Each of those causes of action seeks to apply California law to conduct occurring outside of California.

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[1] *Cox* did not require that the additional proceedings involve only state-law issues. *See* 420 U.S. at 477 ("[i]n most, *if not all*, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date") (emphasis added).

If the Court agrees with AT&T that this extraterritorial regulation violates the Commerce Clause *per se*, that decision will end litigation of RLH's claims.

RLH's sole jurisdictional argument is thus that denial of review would not risk "seriously erod[ing] federal policy." *Cox*, 420 U.S. at 483; *see* Opp. 10.[2] That assertion is demonstrably incorrect: failure to review the California court's decision would have particularly acute consequences for federal policy. The principle that a State may regulate only within its jurisdiction is fundamental to our constitutional structure, finding expression in three separate constitutional provisions: the Commerce Clause, the Due Process Clause, and the Full Faith and Credit Clause. *See* Pet. 14 n.4; *New York Life Ins.*, 234 U.S. at 161 ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state . . . without throwing down the constitutional barriers . . . upon the preservation of which the government under the Constitution depends."). As the Chamber of Commerce and Verizon have properly emphasized in their *amicus* brief (at 19-20), "[m]ore than 150 years of Dormant Commerce Clause jurisprudence makes it clear that, until Congress says otherwise, no State may dictate to the other 49 a set of nationwide commercial rules."

In setting aside this core principle, the lower court's decision has the immediate effect of permitting any California plaintiff to bring suit under California law to challenge conduct occurring wholly in another State based on the claim that alleged "benefits" to California (e.g., benefits to a single California seller) outweigh the burdens of extraterritorial regulation under a standardless balancing test. The decision similarly invites plaintiffs in all other States to bring suits under their States' laws, thus enabling all States to regulate commerce extraterritorially as

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[2] RLH misquotes *Cox* in stating that the "fourth *Cox* exception is only available when delaying review would 'seriously erode . . . Constitutional policy,' *Cox*, 420 U.S. at 483." Opp. 10.

long as the plaintiff can assert some effect on a claimed interest of the State. Failure to grant review would thus seriously erode the "basic principle of federalism . . . that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm*, 538 U.S. at 421-22.

This Court has consistently found decisions involving *less* fundamental federal interests to be within the fourth *Cox* category. Contrary to RLH's suggestion that this category is limited to First Amendment cases, *see* Opp. 10, the Court has regularly granted review under *Cox* to safeguard particular federal statutes from state encroachment. *See, e.g., Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988) (taking jurisdiction to address whether FERC order preempted a state agency from inquiring into the prudence of a plant); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179-80 (1988) (taking jurisdiction to address whether federal law barred an additional workers' compensation award based on state standards); *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983) (reviewing a state-court decision regarding preemption under the National Labor Relations Act).[3] The threat to federal policy is significantly greater here, where the issue is not the preemptive scope of a single federal law, but the basic rules of the road limiting what States may regulate under our constitutional structure.

The two cases relied upon by RLH are readily distinguishable. In *Flynt v. Ohio*, 451 U.S. 619 (1981) (per curiam), the Court found "no identifiable federal policy that

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[3] *See also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (Employee Retirement Income Security Act preemption); *Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984) (Federal Arbitration Act preemption); *Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964) (exemption of state fair trade act from prohibitions of the Sherman Act); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 557-58 (1963) (venue under national banking legislation); *Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 548-51 (1963) (National Labor Relations Act preemption).

will suffer if the state criminal proceeding goes forward" because there was "no reason to treat this selective prosecution claim differently than we would treat any other claim of selective prosecution." *Id.* at 622-23. *Johnson v. California*, 541 U.S. 428 (2004) (per curiam), involved a *Batson* claim, and the Court concluded that "petitioner can make no convincing claim of erosion of federal policy that is not common to all decisions rejecting a defendant's *Batson* claim." *Id.* at 430. Unlike *Flynt* and *Johnson*, this case does not involve the application of a well-settled constitutional rule to particular facts. Rather, it involves a purely legal question of enormous general policy significance: whether direct extraterritorial regulation is a *per se* violation of the Commerce Clause.

II. The Circuits Are In Square Conflict Over Whether Direct Regulation Of Wholly Extraterritorial Conduct Is A *Per Se* Violation Of The Commerce Clause

Nothing in RLH's opposition brief diminishes the sharp conflict between the circuits on the question whether extraterritorial regulation is unconstitutional *per se*. The Second, Seventh, Ninth, and Tenth Circuits have clearly endorsed the *per se* rule, finding it unnecessary to rely on the balancing test of *Pike* to invalidate a state statute controlling conduct occurring wholly outside the State. *See American Booksellers Found.*, 342 F.3d at 103-04 (2d Cir.) ("no need to apply the *Pike* balancing test" because Vermont had "projected its legislation into other States" and "directly regulated commerce therein, in violation of the dormant Commerce Clause") (internal quotation marks omitted); *National Solid Wastes*, 63 F.3d at 657-60 (7th Cir.) (invalidating statute that "essentially controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and therefore directly regulates interstate commerce" without engaging in *Pike* balancing); *NCAA*, 10 F.3d at 639-40 (9th Cir.) (Nevada statute with "extraterritorial effect" was "a per se violation of the Commerce Clause"); *ACLU*, 194 F.3d at 1161 (10th

Cir.) (New Mexico statute "represents an attempt to regulate interstate conduct occurring outside New Mexico's borders, and is accordingly a per se violation of the Commerce Clause"). RLH attempts to muddy the issue by claiming that these decisions invalidated statutes after determining that in "practical effect" the statutes "unduly burdened" interstate commerce. Opp. 12-14. RLH is wrong. Each of these decisions held that, because the statute at issue regulated wholly extraterritorial conduct, it was invalid *per se*. *See American Booksellers*, 342 F.3d at 104; *National Solid Wastes*, 63 F.3d at 658; *NCAA*, 10 F.3d at 640; *ACLU*, 194 F.3d at 1161.

These circuit court decisions thus squarely conflict with the decision below, which conceded that RLH's lawsuit sought to control commercial conduct outside of California, but held that its constitutionality nevertheless turned on the outcome of a balancing test. *See* Pet. App. 15a-16a. Indeed, the lower court believed that this Court's *per se* rule against direct extraterritorial regulation was restricted to the context of price-affirmation statutes, a proposition that the Second and Seventh Circuits have specifically rejected. *Compare id.* at 13a with *American Booksellers*, 342 F.3d at 103-04, and *National Solid Wastes*, 63 F.3d at 659-60.

Like the California court, the First and Eighth Circuits have refused to recognize the *per se* rule against direct extraterritorial regulation. *See Grant's Dairy*, 232 F.3d at 19 ("th[e] reference to direct regulation as a basis for invalidation has not been repeated in subsequent Supreme Court opinions and it does not fit into the *West Lynn* framework") (citations omitted); *Southern Union*, 289 F.3d at 508 ("[i]n its recent Commerce Clause decisions, the Supreme Court has limited its per se rule of invalidity to provisions that patently discriminate against interstate trade") (internal quotation marks omitted). RLH does not deny that these decisions reject the *per se* rule; rather, RLH argues that the First Circuit's position is better encapsulated in *Pharmaceutical Research & Manufacturers*

of America v. Concannon, 249 F.3d 66 (1st Cir. 2001), *aff'd*, 538 U.S. 644 (2003), than in *Grant's Dairy*, and that the Eighth Circuit's position is better represented in *Cotto Waxo Co. v. Williams*, 46 F.3d 790 (8th Cir. 1995), than in *Southern Union* (despite the fact that *Southern Union* is the more recent case). *Concannon*, however, dealt with a statute that it found did *not* regulate transactions or conduct occurring wholly outside the State, *see* 249 F.3d at 81-82; thus, it did not have to hold that such direct extraterritorial regulation was or was not *per se* unconstitutional. Similarly, because *Cotto Waxo* found that the statute at issue did not have "extraterritorial reach," 46 F.3d at 793-94, it too did not need to hold that direct extraterritorial regulation was or was not *per se* invalid.

III. The Decision Below Conflicts With Controlling Supreme Court Law

RLH does not dispute that this Court has endorsed a two-tiered approach to dormant Commerce Clause jurisprudence: a state statute that "*directly regulates* . . . interstate commerce" is unconstitutional "*without further inquiry*," while a statute that "has only indirect effects on interstate commerce and regulates evenhandedly" is unconstitutional if "the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman*, 476 U.S. at 579 (emphases added). As the Court explained in *Healy*, "the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, *whether or not the commerce has effects within the State*." 491 U.S. at 336 (emphasis added; alteration in original).

Nevertheless, RLH contends that the lower court "correctly applied the first tier of this Court's two-tier Commerce Clause analysis." Opp. 17. That is manifestly false. The lower court simply ignored the *per se* "first tier" of the Court's analysis by stating that, in all cases, Commerce Clause jurisprudence "focuses on the *balance* between the state law's benefits to local commerce and its burdens upon interstate commerce, not simply on

the location of the challenged conduct." Pet. App. 15a (emphasis added). RLH's argument that the lower court sanctioned extraterritorial regulation only when out-of-state conduct causes harm in California, *see* Opp. 19, is beside the point. Controlling wholly out-of-state conduct is impermissible "*whether or not* the commerce has effects within the State," *Healy*, 491 U.S. at 336 (emphasis added; internal quotation marks omitted).

RLH's suggestion that other jurisdictions have upheld state antitrust statutes with "incidental effects" on interstate commerce, Opp. 19-20, is similarly irrelevant. The impact on interstate commerce here is direct, rather than an "incidental" consequence of regulation of in-state activity. *See* Pet. 11-12.

Finally, contrary to RLH's assertion, AT&T never conceded "that a nexus between out-of-state anticompetitive conduct and in-state impact upon *consumers or markets*" would prevent extraterritorial regulation from violating the Commerce Clause. Opp. 22. Rather, AT&T explained that direct regulation of wholly extraterritorial conduct is impermissible even when that conduct has in-state effects, but that the lower court also erred in concluding that any injury to RLH from the alleged conduct of AT&T's out-of-state subsidiaries amounted to a substantial effect on California commerce. *See* Pet. 12-13. In any event, the distinction between an impact on markets and an impact solely on a potential plaintiff is hardly a "distinction without a difference," Opp. 22, in antitrust law. *Matsushita* specifically found that an injury to plaintiffs, which were U.S. companies, did not amount to an effect on U.S. commerce warranting application of the Sherman Act. 475 U.S. at 582 & n.6. Similarly, an injury to RLH is not a substantial effect on California commerce.

IV. This Case Is A Superior Vehicle For The Question Presented

This case cleanly presents a pure question of law: whether direct regulation of wholly extraterritorial conduct is a *per se* violation of the Commerce Clause, or

whether its constitutionality turns on the outcome of a balancing test. RLH attempts to obscure the question presented by distorting the facts of the case. RLH first suggests that the claims at issue in this petition are based on RLH's efforts to sell HVP devices in California. *See* Opp. 3. That is false: RLH asserted claims based on its activities in California only against Pacific Bell, the local telephone company in California. RLH could not assert such claims against AT&T's out-of-state subsidiaries, which do not provide local telephone service in California, and thus could not have prevented California customers from purchasing RLH's equipment through any alleged tying arrangement. The claims against Pacific Bell have been dismissed and are not at issue here. *See* Pet. 4 n.2.

Nor does AT&T "fail[] to acknowledge that its conduct has caused injury to California commerce," Opp. 4. The only injury from the alleged anticompetitive conduct of AT&T's out-of-state subsidiaries identified by RLH is to RLH itself, and an injury to a California plaintiff is not an injury to California commerce. Even now, RLH relies on the "'ripple' effects" of the harm to RLH on RLH's employees and suppliers. Opp. 5 n.3. But if such "ripple effects" of injury sustained by a California resident in its efforts to compete outside the State constitute an injury to California commerce, then the "ripple effects" of injuries to the plaintiffs in *Matsushita* would surely have constituted an effect on U.S. commerce. On that theory, any State would be able to regulate commerce occurring in other States that has a financial impact on one of its residents.[4]

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[4] RLH is also wrong to suggest that "California was the locus of part of the allegedly wrongful conduct" described in RLH's complaint. Opp. 4. RLH did allege in its Second Amended Complaint that an employee of "PacBell and/or SBC" based in California, Don Murray, participated in a uniform decision by AT&T's non-California subsidiaries not to approve use of RLH's HVP equipment. Pet. App. 32a (¶ 24). However, it is undisputed that Mr. Murray was in fact an employee of a third party, SBC Services, Inc., not of SBC Communications Inc. or of Pacific Bell. Before the Court of Appeal, RLH did not rely on any alleged in-state conduct by Mr. Murray as a basis for application of California law

RLH further errs in suggesting that any factual disputes regarding the status of filed tariffs in other States bear on the Court's consideration of the question presented. While the existence of these tariffs illustrates the inconsistent regulation that results when States govern extraterritorially, it is irrelevant to the question whether RLH's lawsuit violates the Commerce Clause *per se*. The point of a *per se* rule is precisely that constitutionality does not turn on the extent of the conflict in a particular case.

RLH's next error is to claim that the decision below is of limited practical significance. In fact, the decision is highly significant because it squarely rejects the core principle that a State may not regulate conduct occurring wholly outside its borders. The lower court's decision is of particular concern because it is not restricted to the context of state antitrust statutes. Indeed, the court held that the *per se* rule against direct extraterritorial regulation was itself restricted to the context of price-affirmation statutes. *See* Pet. App. 13a. The decision thus has enormous practical import: it requires companies across the nation that conduct no business in California or with California consumers to conform their actions to California law, given the possibility that a California resident may believe itself injured by conduct outside the State. *See* Pet. 19-23.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

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to the activity of AT&T's non-California subsidiaries. *See* Appellant's Reply Br. at 17-25. The court itself similarly did not rely on any alleged conduct by Mr. Murray.

[5] RLH suggests in passing that the Court's denial of certiorari in *Beretta U.S.A. Corp. v. District of Columbia*, 126 S. Ct. 399 (2005) (No. 05-118), means that it should deny review here. The lower court in *Beretta*, however, found that the state statute at issue did not directly regulate commerce outside the State. *See District of Columbia v. Beretta U.S.A. Corp.*, 872 A.2d 633, 657 (D.C. 2005). Thus, *Beretta* did not squarely present the issue raised in this petition.

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No. 05-1493

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Petitioner,

v.

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PACIFIC BELL TELEPHONE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber is well situated to brief the Court on the importance of the issues presented in the petition to companies collectively responsible for a substantial portion of total U.S. economic activity.

The question presented by this case is an important one for companies that conduct business outside California but deal (or are asked to deal) with California companies as part of a national commercial enterprise. The risks and burdens of multiple litigation for such firms are not peculiar to business competition law, but the antitrust laws pose a unique risk because they confront a firm with the prospect of treble damages liability. Also, antitrust litigation itself can inflict massive costs that are nothing more than a deadweight loss to the firm and society. The combination of potentially staggering penalties and high litigation costs often induces firms to compromise antitrust cases even when they have meritorious defenses. That result does not benefit the competitive process or consumers. It forces

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[1] The parties' letters of consent to the filing of this amicus brief have been lodged with the Clerk. Under S. Ct. R. 37.6, *amici curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

successful businesses to pay unsuccessful parties for spurious claims; it encourages the filing of lawsuits as a means of leadening the saddlebags of profitable firms; and, by clogging the courts with actions that should be brought elsewhere (if they are brought at all), it delays resolution of cases by parties with meritorious claims.

Verizon Communications Inc. is one of the largest providers of telecommunications services in the United States and the world. Like other firms in this industry, Verizon operates a multistate communications network. This enterprise requires large investments and expenditures in order to provide customers in each of the 50 States with wireline, wireless, data, and (in progress) video services, to enhance the technological capabilities of its telecommunications network, and to develop new services. In this respect, Verizon's interest in appropriate, clear, and definite constitutional limitations on the application of state antitrust rules to conduct occurring outside of the forum State is similar to the interest of countless other large businesses in all sectors of the economy.

Verizon's interest differs in kind, not just in degree, however, because extensive multistate regulation of telecommunications has been a fact of life for more than 70 years. Indeed, telecommunications is one of the most heavily regulated industries in our economy, with both the federal and state governments playing complementary, but distinct, roles. The decision below by the California Court of Appeal, Fourth District, threatens to disrupt this system by imposing overlapping and potentially inconsistent state burdens of a type that the Commerce Clause of the United States Constitution was intended to eliminate. The Court of Appeal held that state antitrust liability may be imposed for actions that occur beyond the forum State's borders, that have no effect on markets or consumers within the territory of the forum State, and that even may be entirely lawful under the law of the State where the transaction occurred. Such a holding, if allowed to stand, would

burden the ability of a multistate business to compete successfully in today's economy and would damage the interests of the consumers whom such firms attempt to serve, while advancing no legitimate state interest. Verizon therefore has a substantial interest in the matter before this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

"No State can legislate except with reference to its own jurisdiction." *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1882). Perhaps first articulated in *Bonaparte*, the principle that each State may exercise sovereign power only within its own defined jurisdiction has become an axiom of constitutional law. That principle finds expression in decisions interpreting at least[2] three separate provisions of the United States Constitution: (a) the Commerce Clause, Art. I, § 8, Cl. 3;[3] (b) the Due Process Clause, Amend. XIV, § 1;[4] and (c) the Full Faith and Credit Clause, Art. IV, § 1.[5] The common denominator in each clause is the principle that no State may regulate the internal affairs of

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[2] Also relevant are the Privileges and Immunities Clause of Article IV, § 2, and the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment. They guarantee that each State will treat all persons within its jurisdiction in the same manner as state residents. *E.g.*, *Toomer* v. *Witsell*, 334 U.S. 385, 395-403 (1948). Those sections would be unnecessary if each State could govern its own residents wherever they may be.

[3] *See, e.g.*, *Healy* v. *The Beer Institute*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986); *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

[4] *See, e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996).

[5] *See, e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985); *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302 (1981); *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 161 n.1 (1914) (collecting cases).

another State, its residents, or their activities unless their conduct has a concrete effect on the former State's markets or consumers.[6] By so doing, those clauses "reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy* v. *The Beer Institute*, 491 U.S. 324, 335-336 (1989) (footnotes omitted).[7]

This case involves the Commerce Clause. Under the so-called Dormant Commerce Clause – *viz.*, an implied limitation on state authority over interstate commerce, *see, e.g.*, *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) – States may not discriminate against interstate commerce, nor may they impose unreasonable burdens on it or on parties (including corporations) who engage in it. *See, e.g.*, *Granholm* v. *Heald*, 544 U.S. 460, 471 (2005). Applying that doctrine, this Court has held for more than 70 years that no State may regulate the internal affairs of another regardless of the alleged benefits of doing so. *E.g.*,

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[6] *See Edgar*, 457 U.S. at 643 ("The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'") (quoting *Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977)); *New York Life Ins. Co.*, 234 U.S. at 161 ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. * * * The principle * * * lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause.") (footnote omitted).

[7] It makes no difference whether the state legislature or state courts seek to extend the reach of state law. *See Healy*, 491 U.S. at 336 n.13; *Edgar*, 457 U.S. at 643; *New York Life Ins. Co.*, 234 U.S. at 162.

Healy, 491 U.S. at 324; *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

The California Court of Appeal disregarded that per se rule in favor of a balancing test that would weigh the alleged benefits to California of regulating conduct in (say) Texas. The Court of Appeal believed that this Court permits a balancing test to be used in cases like this one, but this Court rejected that notion in *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), which the court below misread. The court below envisioned no harm from its ruling, but that supposition rests on the mistaken premise that federal and state antitrust law are identical. That decision therefore threatens to destabilize the interstate comity fostered by the Dormant Commerce Clause that makes business planning possible for multistate firms.

ARGUMENT

I. THE COMMERCE CLAUSE PROHIBITS A STATE COURT FROM APPLYING THE FORUM'S SUBSTANTIVE STATE ANTITRUST LAW TO OTHER STATES' MARKETS

A. Beginning with Justice Cardozo's opinion for the Court in *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), on numerous occasions over the past 70 years this Court has held unconstitutional under the Commerce Clause the application of state law to activities occurring in a different State.[8] This

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[8] *See Healy*, 491 U.S. at 324; *Brown-Forman Distillers Corp.*, 476 U.S. at 573; *United States Brewers Ass'n* v. *Healy*, 692 F.2d 275 (2d Cir. 1982), *summarily aff'd*, 464 U.S. 909 (1983); *Edgar*, 457 U.S. at 624; *Schwegmann Brothers Giant Supermarkets* v. *Louisiana Milk Comm'n*, 365 F. Supp. 1144 (M.D. La. 1973), *summarily aff'd*, 416 U.S. 922 (1974); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *see also State Farm*, 538 U.S.at 408; *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996); *Shutts*, 472 U.S. at 797 (relying on the above line of Commerce Clause decisions when construing the Due Process Clause); *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely

Court's decision in *Healy* v. *The Beer Institute*, 491 U.S. 324 (1989), is just the most recent example.[9]

In *Healy*, this Court held unconstitutional a Connecticut statute requiring liquor manufacturers to affirm that their posted prices for in-state sales did not exceed the prices offered in other States. In so ruling, the Court concluded that its prior decisions had established, "at a minimum," 491 U.S. at 336, three relevant propositions: *First*, the "Commerce Clause * * * precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Ibid.* (internal punctuation omitted). *Second*, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Ibid.* (same). *Third*, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Ibid.* at 336 (same).

Applying those principles to the statute at issue, the Court held that "the Connecticut statute has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." 491 U.S. at 337. The "practical effect" of the Connecticut law, when considered "in conjunction with

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because the welfare and health of its own citizens may be affected when they travel to that State."); *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extraterritorial effect only by the comity of other States").

[9] Since 1989, the Court has twice reaffirmed the principles articulated in *Healy* in cases involving the Due Process Clause. *State Farm*, 538 U.S. at 421-422; *Gore*, 517 U.S. at 570-573.

the many other beer-pricing and affirmation laws that have been or might be enacted throughout the country," was pernicious, the Court concluded, because it threatened "to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Id.*

The principles set forth in *Healy* were hardly novel. Indeed, the law could hardly be otherwise. The Framers adopted the Commerce Clause to remedy the fundamental problem occasioning the need for the Constitution itself: namely, the absence of a federal power under the Articles of Confederation to regulate commerce and prevent the economic Balkanization of the fledgling nation. The Framers saw internecine trade wars threaten to split apart the new republic as each State sought to champion its own parochial firms and interests. The Articles of Confederation were useless to stem this destructive rivalry because they contained no provision comparable to the Commerce Clause that would empower a national governing body to referee competing state claims of authority and keep the States from burdening national commerce with self-interested ordinances.[10] Realizing the need for just such a solution and seeking to cabin the centrifugal forces produced by the States'

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[10] In this respect the States operated, under the Articles of Confederation, in a manner similar to the sovereign nations in today's global economy. Matters touching on the interests of two different States could be regulated by one State or the other or both, but not by any higher (interstate) authority, just as today one or both of two different nations – but not any international competition authority – might claim the authority to regulate competitive conditions with effects in both nations. *See generally F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004). Even if the "effects doctrine" might allow the application of U.S. federal antitrust law to conduct affecting U.S. exporters' efforts to do business in foreign markets – *but see* Pet. 13 (citing *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 & n.6 (1982)) – it would not at all follow that California is entitled to apply California antitrust law to conduct affecting California exporters' efforts to do business in Wisconsin or Texas.

self-interested regulation of trade, James Madison drafted the Commerce Clause to empower the Congress – in which all of the States were represented, U.S. Const. Art. I, § 2, Cl. 1, § 3, Cl. 1 – to accommodate their conflicting interests and to regulate interstate trade for the good of the nation. *Healy*, 491 U.S. at 335-336.[11]

B. The decision below threatens a recurrence of the very type of disharmony that the Framers sought to forestall through the Commerce Clause. That ruling would allow RLH to recover treble damages for transactions undertaken by AT&T in other States – even though those transactions had no effect on California markets or consumers, and may have been entirely lawful under the laws of the States where the transactions occurred. Those States may not analyze tying arrangements in the same way that they are treated under California law, or those States may deem the challenged conduct immune from suit under another feature of federal or state law. (That may explain why RLH chose this unusual forum for a lawsuit challenging business dealings a thousand miles away under state, not federal, law.)

For example, a different State may analyze the conduct at issue under the Filed Tariff Doctrine. That doctrine – first articulated in Justice Brandeis's opinion for this Court in *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156 (1922) – prohibits a party from challenging under the antitrust laws (or any other law for that matter) the actions of a regulated utility taken in conformity with the provisions of a tariff filed with the responsible administrative agency.[12] That doctrine is fully

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[11] *See also, e.g.*, *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979); *The Federalist* Nos. 41 & 42; James Madison, *Vices of the Political System of the United States*, in 2 Writings of James Madison 362-363 (G. Hunt ed. 1901).

[12] The doctrine forbids a regulated entity to charge rates for its services, or to offer service features (such as faster delivery), other than those properly filed with the appropriate regulatory authority. By rendering a

applicable to the actions of a regulated telecommunications carrier. *AT&T* v. *Cent. Office Tel., Inc.*, 524 U.S. 214 (1998); *MCI Telecommunications Corp.* v. *AT&T*, 512 U.S. 218 (1994). The decision below thus creates the anomaly that AT&T's decisions to require use of specified high voltage protection (HVP) equipment, which were entirely lawful in the only States whose markets or consumers were affected by those decisions, nevertheless could be held unlawful by a State with no relationship to the relevant transactions, just because the plaintiff is a resident of that State. By a parity of reasoning, economic regulation of California markets would not be determined by the California legislature alone, but by the application of the economic regulatory legislation (and underlying philosophy) of each of the other 49 States, to the extent that residents of those States sought to do business in California markets. The Federal Constitution does not allow a State to impose liability in those circumstances.

It does not matter whether AT&T had complied fully with the laws of other States when it decided to mandate the use of HVP equipment other than RLH's product. As a matter of federal constitutional law – not just state choice-of-law principles – California cannot apply its antitrust law to this transaction even if AT&T violated (for example) Texas law, since the transactions in question had no effect on California's markets or consumers. *See State Farm*, 538 U.S. at 421-422; *Shutts*, 472 U.S. at 821-822. One of the virtues of a federal system is that a company like AT&T is entitled to limit its liability under any

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tariff a guarantee of only the services defined within, the doctrine also necessarily bars resort to other laws (such as state antitrust laws) as a means of supplementing those services. *E.g.*, *AT&T* v. *Cent. Office Tel., Inc.* 524 U.S. 214, 223-224 (1998); *Keogh*, 260 U.S. at 163. "The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff." *Cent. Office Tel.*, 524 U.S. at 230-231 (Rehnquist, C.J., concurring).

State's law by ensuring that its actions have no effect within that State. Otherwise – that is, if every business can be held liable under the law of each of the 50 States just because a plaintiff chooses to bring suit there – no business would be free from the regulation of any State that wishes to extend its reach nationwide for whatever reason. Only Congress was granted plenary authority to regulate interstate commerce, however, because only in Congress is every State afforded the representation that the Framers saw as the antidote to interstate warfare. *See S. Pac. Co.* v. *Arizona*, 325 U.S. 761, 767 n.2 (1945).

C. The Court of Appeal erred in the reasons that it gave for rejecting AT&T's Commerce Clause argument.

1. Initially, the Court of Appeal declined to apply the ruling in *Healy* to this case on two grounds: "*Healy* did not specifically consider state antitrust laws," Pet. App. 14a, and the application of California antitrust law to the challenged conduct would not pose a risk of inconsistent state law rulings "because the Sherman Act already bars tying arrangements throughout the land." *Ibid.* That is a non sequitur, for two reasons.

First: The Court of Appeal concluded without any analysis that California law and federal law are identical regarding tying arrangements. To justify that proposition, the court below cited, Pet. App. 6a, 14a, this Court's 1958 decision in *Northern Pacific Railway* v. *United States*, 356 U.S. 1 (1958), which stated that "[t]ying agreements serve hardly any purpose beyond the suppression of competition." 356 U.S. at. 6 (quoting *Standard Oil Co.* v. *United States*, 337 U.S. 293, 305-306 (1949)). But federal antitrust law has changed enormously in the near half-century since the *Northern Pacific Railway* case was decided. Today, federal law requires a far more sophisticated analysis than did *Northern Pacific Railway* of the legality of alleged tying arrangements. *See, e.g., Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 25 (1984) ("There is nothing inherently anticompetitive about packaged sales."); *Grappone, Inc.* v.

Subaru of New England, 858 F.2d 792, 795 (1st Cir. 1988) (Breyer, J.) ("[T]o understand the harm that tying may cause requires a fairly subtle antitrust analysis. One cannot infer an automatic harm to the competitive process simply because a Seller refuses to sell Product A to a Buyer unless the Buyer also buys Product B. That is to say, a tie does not 'obviously' hurt a Buyer by making it take a product it does not want.").[13] Only this Term, the Court has made clear that the above statement in *Northern Pacific Railway* no longer is good law. *See Ill. Tool Works, Inc.* v. *Indep. Ink, Inc.*, 126 S. Ct. 1281, 1286-1287 (2006). Accordingly, the Court of Appeal erred in assuming the federal and California law regarding tying arrangements are identical.

Second: The question presented by this case is not whether the Commerce Clause *authorizes* Congress to reach the conduct at issue, or whether the Sherman Act *regulates* these transactions, but is whether the Commerce Clause *limits* California's exercise of its own antitrust law over that activity. An affirmative answer to the first two inquiries undercuts rather than supports the proposition that the Dormant Commerce Clause leaves room for California to regulate extraterritorially. The Commerce Clause is *both* an affirmative grant of *authority* to Congress and an implied *restraint* on the police power of the States. Unless Congress has delegated to the States the power to regulate interstate commerce, Congress's exercise of its express textual authority over that subject does not lift the implied prohibition on a State's effort to regulate directly transactions taking place in other States. Accordingly, the jurisdictional reach and the substance of federal antitrust law provide no

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[13] *See also, e.g.*, 10 Philip E. Areeda, Herbert Hovenkamp & Einer Elhauge, *Antitrust Law* ¶ 1758d1, at 330 (2d ed. 2004); Robert H. Bork, *The Antitrust Paradox* 365-381 (1978); Keith N. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* 295 & n.42, 297-302 (2003); Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. Chi. L. Rev. 229, 235 (2005).

support for the authority of a State to regulate an extraterritorial transaction.

2. Construing *Raymond Motor Transport, Inc.* v. *Rice*, 434 U.S. 429 (1977), and *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), the court below made the remarkable – and quite erroneous – statement that "the commerce clause's primary concern is not geographic, but practical." Pet. App. 15a. As we have shown above, in case after case after case this Court has construed the Commerce Clause to place stringent limits on States' efforts to regulate out-of-state conduct. Paying little heed to the relevant line of cases, and focusing instead on *Raymond Motor Transport* and *Pike* v. *Bruce Church*, the court concluded that, in every case, the Commerce Clause "focuses on the balance between the state law's benefits to local commerce and its burdens upon interstate commerce, not simply on the location of the challenged conduct." Pet. App. 15a. That statement seriously misreads the Court's decisions.

Neither *Raymond Motor* nor *Pike* involved extraterritorial application of state law. In both cases, state law regulated conduct that occurred within the territory of the State involved. *Raymond Motor*, 434 U.S. at 430-435 (regulations governing the length and configuration of trucks driven within the State); *Pike*, 397 U.S. at 139-140 (order requiring that fruit grown in State be labeled as such). Neither case, therefore, addressed the very different factual scenario present here, in which a State is attempting to regulate directly transactions occurring in other States.

The Court of Appeal construed *Healy* v. *The Beer Institute* – which *did* involve a State's attempt to regulate out-of-state transactions directly – as an application of the *Pike* v. *Bruce Church* balancing test. That interpretation of *Healy* is quite wrong. The *Pike* case is not even cited in *Healy*. Moreover, *Healy* is an application of this Court's decision in *Brown-Forman Distillers Corp.*, 476 U.S. at 574. Justice Marshall's opinion for the Court in *Brown-Forman* explained that "[t]his

Court has adopted what amounts to a two-tiered approach to analyzing state regulation under the Commerce Clause." *Id.* at 578-579; *accord Healy*, 491 U.S. at 337 n.14.

The *first* tier is the one at issue in *Brown-Forman*, *Healy*, and the present case: "When a state statute directly regulates *or* discriminates against interstate commerce, * * * we have generally struck down the statute *without further inquiry*." 476 U.S. at 579 (emphasis added). The Court made it quite clear that the state statute invalidated in *Brown-Forman* fell into "the category of state regulation that is virtually *per se* invalid under the Commerce Clause," *ibid.*: "New York has 'project[ed] its legislation' into other States, and directly regulated commerce therein, in violation of *Seelig, supra*." *Id.* at 584.

It is the *second* category identified in *Brown-Forman* that is governed by the *Pike* balancing test: "When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." 476 U.S. at 579. This case does not fall into that category. There is nothing "incidental" about the effect in other States of applying California antitrust law extraterritorially to regulate the markets in those States, just as there was nothing "incidental" about the effect in other States of the statutes struck down in *Brown-Forman* and *Healy*. The Court of Appeal went seriously astray in thinking that the Commerce Clause issue in this case called for the application of a balancing test rather than the rule of "virtual[] *per se* invalid[ity]." Indeed, it would be bootless to surmise that the balancing test used in cases like *Pike* furthers the analysis in cases like this one, since *no* number or type of benefits on RLH's side can tip the scale in its favor. *See Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 202 (1925) ("[T]here can be no justification for the exercise of a power that is not possessed.").

3. From the bare fact that RLH is a California resident, the Court of Appeal concluded that this case falls within the rule stated in other cases that States may "appl[y] their antitrust laws to out-of-state conduct injuring their residents." Pet. App. 17a. But *every* authority cited for that proposition involved an injury to in-state consumers or markets, not a mere injury to a state resident wishing to export goods to another State. The distinction is vitally significant for purposes of federal constitutional law.

Antitrust law is a form of economic regulation of markets. *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, C.J.); *see also, e.g.* Herbert Hovenkamp, *The Antitrust Enterprise* 7 (2005) ("[A]ntitrust is a form of regulation – a type of market intervention in an economy whose nucleus is private markets."); *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 263 (1983) (describing "the federal antitrust laws" as "federal regulatory statutes"). A resident of any State must expect, when it does business in California markets, to comply with all of California's economic regulatory laws, including its antitrust laws. The very constitutional principles that forbid California to regulate other States' markets likewise forbid other States to regulate California's markets. *See, e.g., Gore*, 517 U.S. at 571 (citing *Healy*) ("one State's power to impose burdens on [an] interstate market * * * is also constrained by the need to respect the interests of other States"); *id.* at 572 ("the economic penalties that a State * * * inflicts on those who transgress its laws * * * must be supported by the State's interest in protecting its own consumers and its own economy"). Among the States, California, and only California, has power to protect the State's own markets. Thus, California's power to protect its own markets by applying regulation to conduct – wherever undertaken – that affects California markets provides no support for the proposition that California may regulate the Midwestern markets at issue in this case. Rather, it proves the very point

that the *other* States whose markets are at issue have power – exclusive of California – to regulate those markets.

Likewise, the latitude California may have to protect California consumers when interstate businesses engage in transactions with those consumers provides no support for the proposition that a California company may seek to go *outside* California and try to do business elsewhere, then demand that its out-of-state would-be business partner comply with California law. Both federal law and the law of the State in which the California company attempts to do business are available to protect the California company. Notably, however, RLH has not attempted to invoke federal antitrust law or the law of any State in which the alleged tying arrangements were undertaken. It wishes, instead, to do exactly what the Commerce Clause forbids: "project[] * * * one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 337.

II. The Decision Below Will Impose A Needless Burden On Multistate Companies Doing Business In California

A. Despite the clarity and consistency with which this Court has stated the principles summarized in *Healy*, disarray persists in the lower courts. For example, in *Grant's Dairy-Maine, LLC* v. *Commissioner of Maine Department of Agriculture*, 232 F.3d 8, 19 (1st Cir. 2000), the court declined "to give credence to" what it called "the *Brown-Forman* dictum" and took the astounding position that this Court's "reference to direct regulation as a basis for invalidation" may be disregarded (at least in milk cases) because it "has not been repeated in subsequent Supreme Court cases" and does not fit within the framework of *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994). Like the court below in this case, the First Circuit took a bedrock principle of our federal system and trivialized it as one narrowly applicable to the factual context of the case in which it was announced. *See also* Pet. 18-20.

Yet most appellate courts – at least most federal appellate courts – have correctly understood that direct extraterritorial regulation is *per se* unconstitutional in a variety of factual settings. *See* Pet. 16-18 (discussing cases applying the governing constitutional principle to extraterritorial regulation of the Internet, control of solid waste, and athletic disciplinary proceedings). Perhaps most closely analogous to this case is *NCAA* v. *Miller*, 10 F.3d 633 (9th Cir. 1993), in which the court invalidated a Nevada statute that, like the proposed application of California antitrust laws in this case, attempted to protect in-state residents by direct regulation of interstate commerce. Businesses that engage in commerce with California residents thus have no idea what Commerce Clause analysis will be applied to an attempt to apply California law extraterritorially to such commerce – the Ninth Circuit's correct analysis or the incorrect analysis of the California Court of Appeal below. Given the inconsistency that has developed in the 16 years since this Court decided *Healy*, it is important for this Court to bring needed clarity to this issue. *See, e.g.*, *Martinez* v. *Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 155 & n.2 (2000).

B. Antitrust disputes are typically complex with costly and protracted discovery and motions practice once a complaint is held sufficient.[14] The ability of an antitrust plaintiff to impose massive litigation costs on a defendant, and to seek treble

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[14] *E.g.*, 6 *Moore's Federal Practice* ¶ 26.46[1], at 26-146.24 (3d ed. 2003) ("Because of the complexity of the issues and the breadth of the discovery allowed, antitrust cases have become known as 'serpentine labyrinths' in which discovery is a 'bottomless pit.' Frequently, * * *, the large volume of material subject to discovery in antitrust cases is the result of the large amount of information that is necessary to prove the allegations of the parties.") (footnotes omitted); William W. Schwarzer, *Managing Antitrust and Other Complex Litigation* 14 (1982) ("[a]ntitrust * * * cases remain pending much longer than civil cases generally") (providing statistics).

damages, creates a powerful incentive to bring antitrust claims in the hope of coercing settlement, even if the claim does not have merit.[15]

The universally endorsed goal of the antitrust laws is the protection of consumer welfare.[16] Federal antitrust law and the laws of Nevada, Texas, Oklahoma, Missouri, Kansas, Arkansas, Indiana, Ohio, Wisconsin, Illinois, Michigan, and Connecticut are available to protect the interests of consumers in those States if in fact AT&T has done something anticompetitive. To add to AT&T's burdens, however, the possibility that its conduct might be deemed to violate California law – when no effect on California consumers or markets is alleged – would be to multiply manyfold the compliance burdens of AT&T and any other similarly situated company. These practical consequences

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[15] *E.g.*, Donald Turner, *The Durability, Relevance and Future of American Antitrust Policy*, 75 Cal. L. Rev. 797, 811 (1987) ("the mandatory treble damages rule has adverse effects, * * * encouraging baseless or trivial suits brought in hopes of coercing settlements"); Kenneth G. Elzinga & William Breit, *The Antitrust Penalties* 90-94 (1976) (availability of treble damages encourages prosecution of strike suits); Stanley J. Levy, *Discovery – Use, and Abuse, Myth and Reality*, 17 Forum 465, 468 (1982) (complex cases such as antitrust cases create more discovery and more abuse of discovery than noncomplex cases); Martin I. Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation*, 48 Fordham L. Rev. 907, 909 (1980) ("Nowhere is the [discovery abuse] problem more apparent and the abuse more flagrant than in complex civil litigation, particularly class actions and multiparty securities and antitrust cases.").

[16] *See, e.g.*, *Brooke Group* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (per Kennedy, J.); *Grappone, Inc.*, 858 F.2d at 794; Robert H. Bork, *Antitrust and Monopoly: The Goals of Antitrust Policy*, 57 Amer. Econ. Rev. 242, 244 (1967); Hovenkamp, *The Antitrust Enterprise* 1 (2005); Richard Posner, *Antitrust Law* ix (2d ed. 2001).

of the decision below, in addition to its patent legal incorrectness, are strong reasons for this Court to grant review.[17]

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[17] Also relevant are the arguments of prominent antitrust scholars that it is a mistake to allow States to enforce the federal antitrust laws. Several rationales are given: States cannot materially contribute to antitrust enforcement against sophisticated wrongdoers due to inadequate resources; free-riding by States on federal efforts needlessly increases the transaction costs of enforcement actions; state antitrust enforcement is unnecessary in any field (like telecommunications) regulated by federal or state agencies; state enforcement frustrates uniform enforcement of federal law; and state enforcement actions are more likely motivated by inappropriate political considerations. A State's attempt to use its own antitrust laws to regulate transactions to which it is a bystander poses similar risks and burdens. *See, e.g.*, Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, in Richard Epstein & Michael Greve, eds., *Competition Laws in Conflict* 252 (2004); Robert B. Bell, *Should the States Enforce National Mergers?*, 3 Antitrust 37 (Spring 1989); Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, in Richard Epstein & Michael Greve, eds., *Competition Laws in Conflict* 267 (2004); Michael DeBow, *Restraining State Attorneys General, Curbing Government Lawsuit Abuse*, Policy Analysis 437, 443 (May 10, 2002); Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 Harv. J. L. & Pub. Pol'y 877 (2003); Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y. Law School L. Rev. 1047 (1990); Edward T. Swaine, *The Local Law of Global Antitrust*, 43 Wm. & Mary L. Rev. 627 (2001); David A. Zimmerman, Note, *Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers*, 48 Emory L.J. 337 (1999); Richard A. Posner, *Antitrust Law* 280-82 (2d ed. 2001); Richard A. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 940-41 (2001); *cf.* Roger L. Faith, Donald L. Leavens & Robert D. Tollison, *Antitrust Pork Barrel*, 25 J. of L. & Econ. 329 (1982); *see generally* Letter from R. Bruce Josten, Executive Vice-President, Government Affairs, U.S. Chamber of Commerce, to the Antitrust Modernization Comm'n, *Comments on Issues Accepted for Study* 1-6 (Nov. 11, 2005); Michael Greve, *"What They Have Done, and What They Have Failed To Do,"* 1 n.2 (John M. Olin Program in Law and Economics, University of Chicago Law School, June 18 & 19, 2004) (collecting authorities identifying competing positions).

C. But there is more. Although the complaint sought relief under California antitrust law, the limit placed by the California Court of Appeal on the reach of the Dormant Commerce Clause is not confined to such lawsuits. That decision allows damages to be sought from American businesses (or administrative penalties to be imposed, for that matter) just because the plaintiff happens to seek relief in California. Under that ruling, States could opt to apply various types of laws – such as labor or environmental laws – to transactions that cause no harm in California to its residents, businesses, and markets, regardless of where the transaction occurred. At a minimum, the decision below exposes companies like AT&T to frivolous litigation in California courts over matters that should be litigated elsewhere, if at all. The risk that such litigation could be used as a weapon for disappointed competitors and disgruntled businesses should be snuffed out before it leads to socially destructive litigation.[18]

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Each of the 50 States doubtless believes that its own antitrust laws best achieve its own chosen procompetitive goals (whatever they are) at a minimum cost (whatever hurdle they may set) while attaining a "fair and just" resolution of the matter for the parties and public (however that term is defined). But no State is entitled to have a commercial dispute adjudicated under that State's law when the conduct at issue had no effect on that State's markets or consumers. More than 150 years of Dormant

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[18] "As we know, it is not always necessary to win cases in order to blunt a rival's competitive weapons. Harassment by lawsuit or even the threat of harassment can be a marvelous stimulus to timidity on the part of competitors. The potential defendant who cannot judge in advance with any reasonable degree of certainty whether its behavior will afterward be deemed illegal is particularly vulnerable to guerrilla warfare and intimidation into the sort of gentlemanly competitive behavior that is the antithesis of true competition." William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J. of L. & Econ. 247, 254 (1985).

Commerce Clause jurisprudence makes it clear that, until Congress says otherwise, no State may dictate to the other 49 a set of nationwide commercial rules. Because the California Court of Appeal has sought to do just that, review by this Court is necessary to correct that clear legal error and prevent it from causing considerable mischief to our economy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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